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Integrating Governmental and Officer Tort Liability

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INTEGRATING GOVERNMENTAL AND OFFICER TORT LIABILITY

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INTRODUCTION

The legislative and judicial dismantling of sovereign immunity is among the more significant and celebrated reforms of recent American administrative law.[1] In many instances, this development has given those seeking damages for wrongful governmental action their first and only defendant. Even in situations in which litigants already had a cause of action against individual public officials, making the government amenable to suit has enhanced the chances of actual recovery, since officials often lack the means to satisfy judgments rendered against them.[2] The immunity from liability enjoyed by public officials also has undergone a complex series of changes.[3] Though still in flux, this controversial area of the law today finds officials exposed to a considerable risk of personal liability for the wrongs they commit in counection with their performance of duty.

Although these developments might have gone even further in lowering the shield of immunity from the government and its officers, they represent a

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1. *See generally* K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES ch. 25 (1976) [hereinafter cited as K. DAVIS, SEVENTIES]; B. SCHWARTZ, ADMINISTRATIVE LAW §§ 198, 200 (1976); Carrow, *Sovereign Immunity in Administrative Law—A New Diagnosis*, 9 J. PUB. L. 1 (1960); Cobey, *The New California Governmental Tort Liability Statutes*, 1 HARV. J. LEGIS. 16 (1965); David, *Tort Liability of Local Government: Alternatives to Immunity from Liability or Suit*, 6 U.C.L.A. L. REV. 1 (1959); Jacoby, *Roads to the Demise of the Doctrine of Sovereign Immunity*, 29 AD. L. REV. 265 (1977); Peterson, *Governmental Immunity: Has a Change Finally Come?*, W. ST. U. L. REV. 209 (1975); Van Alstyne, *Governmental Tort Liability: Judicial Lawmaking in a Statutory Milieu*, 15 STAN. L. REV. 163 (1963); Van Alstyne, *Governmental Tort Liability: A Public Policy Prospectus*, 10 U.C.L.A. L. REV. 463 (1963) [hereinafter cited as Van Alstyne, *Public Policy*]; Vanlandingham, *Local Governmental Immunity Re-examined*, 61 NW. U. L. REV. 237 (1966).

2. *See, e.g.*, S. REP. No. 588, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 2789, 2790.

3. *See generally* Block, *Suits Against Government Officers and the Sovereign Immunity Doctrine*, 59 HARV. L. REV. 1060 (1946); David, *The Tort Liability of Public Officers*, 12 S. CAL. L. REV. 127, 260, 368 (1939); Davis, *Administrative Officers' Tort Liability*, 55 MICH. L. REV. 201 (1956); Gray, *Private Wrongs of Public Servants*, 47 CALIF. L. REV. 303 (1959); Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 HARV. L. REV. 209 (1963); James, *Tort Liability of Governmental Units and Their Officers*, 22 U. CHI. L. REV. 610 (1955); Jennings, *Tort Liability of Administrative Officers*, 21 MINN. L. REV. 263 (1937); Keefe, *Personal Tort Liability of Administrative Officials*, 12 FORDHAM L. REV. 130 (1943); McManis, *Personal Liability of State Officials under State and Federal Law*, 9 GA. L. REV. 821 (1975); Nelson & Avnaim, *Claims Against a California Governmental Entity or Employee*, 6 SW. U. L. REV. 550 (1974); Van Alstyne, *Claims Against Public Employees: More Chaos in California Law*, 8 U.C.L.A. L. REV. 497 (1961); Vaughn, *The Personal Accountability of Public Employees*, 25 AM. U. L. REV. 85 (1975); *Developments in the Law: Section 1983 and Federalism*, 90 HARV. L. REV. 1065 (1977) [hereinafter cited as *Developments*]; Note, *Federal Executive Immunity from Civil Liability in Damages: A Reevaluation of* Barr v. Matteo, 77 COLUM. L. REV. 625 (1977) [hereinafter cited as *Federal Executive Immunity*].

blessing for the victims of official wrongdoing. However, the emerging coexistence of governmental and officer liability has created a new problem of coordination. Without attempting to define the proper scope of liability for harm arising out of governmental activity, this Article explores various aspects of the coordination problem. After briefly sketching recent developments in governmental and officer immunity, and discussing the need for a coherent system of governmental tort law, I shall examine various ways of integrating governmental and officer tort liability so as to accommodate the purposes that the law of governmental torts may appropriately be asked to serve. A brief look will be taken in this connection at the approaches to the problem that have been adopted in French and German law.

I. THE SHIFTING BACKGROUND OF IMMUNITY

A. *The Sovereign Immunity Doctrine*

Although a variety of arguments have been advanced for immunizing the government from suit without its consent,[4] the doctrine of sovereign immunity has been justified on the practical ground that satisfying private claims against the state would cause an intolerable drain on public funds and interfere with the effective functioning of government.[5] However, recent reflection has led to the view that such fears are exaggerated and that in any event asking innocent victims to bear alone the losses inflicted upon them through governmental activity is fundamentally unfair.[6] Today, the cost of compensating for many such losses is regarded as an ordinary expense of government to be borne indirectly by all who benefit from the services that government provides.

By enacting the Federal Tort Claims Act of 1946, Congress made the United States liable "in the same manner and to the same extent as a private individual under like circumstances."[7] However, this general waiver of immunity from tort liability excludes claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."[8] Although Congress

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4. For historical background of the sovereign immunity doctrine, see Jaffe, *supra* note 3; James, *supra* note 3, at 611-13. According to Justice Holmes, "A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends." Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907).

5. *See* 2 F. HARPER & F. JAMES, THE LAW OF TORTS, 1611-12 (1956).

6. *See id.* at 1612. *See also* Professor Borchard's seminal discussions of sovereign immunity entitled *Governmental Responsibility in Tort: I-VII*, 34 YALE L.J. 1, 129, 229 (1924); 36 YALE L.J. 1, 757, 1039 (1926); 28 COLUM. L. REV. 577, 735 (1928). The availability to public entities of relatively inexpensive liability insurance has greatly eased the transition from immunity to liability.

7. 28 U.S.C. § 2674 (1970).

8. 28 U.S.C. § 2680(a) (1970). The Act also contains an exemption for certain intentional torts. *Id.* § 2680(h).

was willing in principle to have the federal government pay for most of the harm its employees might inflict through garden-variety negligence in carrying out their duties, it sought through this exception to preserve the sovereign's immunity from tort claims arising out of conscious governmental decisionmaking.[9] The courts traditionally have read the exception broadly.[10]

The states have surrendered their sovereign immunity in a bewildering variety of ways. A great many state legislatures have enacted some sort of general waiver of immunity.[11] In most other states, the doctrine has largely been abrogated by the courts.[12] Even in the jurisdictions whose courts have refused, despite legislative inaction, to take matters into their own hands,[13] the shield of common law immunity seems to be perforated with a haphazard collection of narrow statutory exceptions.[14] Although legislative waivers of governmental immunity differ widely from state to state,[15] most state statutes, like the Federal Tort Claims Act, distinguish between discretionary and nondiscretionary acts.[16] Where such a distinction is not explicitly drawn, courts frequently infer it.[17]

Courts on both the federal and state levels have tended recently to reduce the scope of the discretionary acts exception. Some have explicitly rejected the idea that the exercise of a degree of judgment should in itself immunize the government; they would limit the exception to policy decisions that define the public interest in some basic way.[18] The continuing erosion

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9. *See* 2 F. HARPER & F. JAMES, *supra* note 5, at 1657-58. On the distinction between injury arising through accident and that imposed as a result of the deliberate exercise of governmental authority intended to alter an individual's position, see Jaffe, *supra* note 3, at 212.

10. *See, e.g.*, Dalehite v. United States, 346 U.S. 15 (1953). *See generally* W. GELLHORN & C. BYSE, ADMINISTRATIVE LAW 370-73 & nn.6 & 7 (6th ed. 1974).

11. *See* K. DAVIS, SEVENTIES, *supra* note 1, at § 25.00-1.

12. *See id.* at § 25.00.

13. *See id.* at §§ 25.00-.00-2.

14. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 975 (4th ed. 1971); Note, *Governmental Tort Immunity in Massachusetts: The Present Need for Change and Prospects for the Future*, 10 SUFFOLK U. L. REV. 521 (1976).

15. Important areas in which statutes differ include the governmental unit exposed to liability, *see, e.g.*, CAL. GOV'T CODE § 815 (West 1966) (all public entities); HAW. REV. STAT. § 662-2 (1968) (state government only); OKLA. STAT. ANN. tit. 11, § 1753 (West Supp. 1978) (municipalities only), the exemptions enjoyed by such units, *see* K. DAVIS, SEVENTIES, *supra* note 1, at §§ 25.00-1, 25.13; B. SCHWARTZ, *supra* note 1, at 568-69, and the ceilings (if any) on the amounts that plaintiffs may recover, *see, e.g.*, MINN. STAT. ANN. §§ 3.736(4), 466.04 (West 1977); N.C. GEN. STAT. § 143-291 (1975); ORE. REV. STAT. § 30.270 (1975). Moreover, some states have established special boards or courts of claims to decide damage claims against the government. *See, e.g.*, CONN. GEN. STAT. ANN. §§ 4-142, 4-160 (West Supp. 1978); ILL. ANN. STAT. ch. 37, §§ 439.1, 439.8 (Smith-Hurd 1972); MICH. COMP. LAWS ANN. § 600.6419 (1968).

16. *See, e.g.*, IDAHO CODE § 6-904(1) (Supp. 1977); IND. CODE ANN. § 34-4-16.5-3(b) (Burns Supp. 1977); N.J. STAT. ANN. § 59:2-3(a) (West 1977); TENN. CODE ANN. § 23-3311(1) (Supp. 1977); UTAH CODE ANN. § 63-30-10(1) (1968).

17. *See, e.g.*, Boucher v. Fuhlbruck, 26 Conn. Supp. 79, 213 A.2d 455 (1965); Charles O. Desch, Inc. v. State, 50 App. Div. 2d 253, 377 N.Y.S.2d 667 (1975); King v. City of Seattle, 84 Wash.2d 239, 525 P.2d 228 (1974).

18. Downs v. United States, 522 F.2d 990, 997-98 (6th Cir. 1975); Griffin v. United States, 500 F.2d 1059, 1064-65 (3d Cir. 1974); Moyer v. Martin Marietta Corp., 481 F.2d 585, 598 (5th Cir. 1973); Breed v. Shaner, 45 U.S.L.W. 2510 (D. Hawaii 1977). *See also* Jones v. State, 33 N.Y.2d 275, 280-81, 307 N.E.2d 236, 238, 352 N.Y.S.2d 169, 172-73 (1973). *But see* Wright v. United States, 568 F.2d 153 (10th Cir. 1977).

of sovereign immunity has greatly enhanced the prospects of recovering damages from the government for the torts committed by its agents. Nevertheless, governmental liability has had its limits and will almost certainly continue to have them. As long as this is the case, plaintiffs will be tempted to join individual officials as defendants in governmental tort litigation if permitted to do so.

B. *Individual Officer Immunity*

Compared to sovereign immunity, the exemption from liability enjoyed by individual public officials has followed a highly erratic course. Over a relatively short period, the law has fluctuated between one extreme solution and another, without settling for too long at any one position. Matters today are still not entirely resolved.[19]

The restlessness of the courts on the question of officer immunity reflects conflicting policy considerations. On the one hand, wrongdoing seems worth deterring or punishing whatever hat the wrongdoer happens to wear. Moreover, there is something anomalous about denying relief to a tort victim simply because he had the added misfortune of being injured by a public official rather than a private citizen. Thus, the common law traditionally did not distinguish between public officials and private individuals for purposes of determining the scope of personal tort liability. In fact, courts that drew such a distinction often imposed a stricter standard of care on officials than on private individuals, holding them personally liable for the consequences of simple non-negligent mistakes.[20]

More recently, however, the courts have recognized that the threat of personal liability may make public officials unduly fearful in their exercise of authority and discourage them from taking prompt and decisive action.[21] This concern, which rests upon the plausible though undocumented assumption that such burdens cannot be imposed upon individual officials without breeding an unhealthy timidity on their part,[22] has led many courts to accord administrative officials at least a qualified immunity that would relieve them of liability for the reasonable and good faith exercise of discretion within the scope of their authority.[23] Limiting immunity to discretionary functions follows from the premise that fear of personal liability can inhibit conduct only when there is room for judgment in deciding whether or how

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19. *See Federal Executive Immunity*, *supra* note 3.

20. *See, e.g.*, Miller v. Horton, 152 Mass. 540, 26 N.E. 100 (1891) (Holmes, J.). *See generally* W. GELLHORN & C. BYSE, *supra* note 10, at 335-38; Keefe, *supra* note 3, and cases cited therein.

21. *See* Barr v. Matteo, 360 U.S. 564, 571 (1959); Expeditions Unltd. Aquatic Enterprises, Inc. v. Smithsonian Inst., 566 F.2d 289 (D.C. Cir. 1977) (en banc).

22. Justice Brennan, dissenting in Barr v. Matteo, 360 U.S. 564, 590 (1959), described this assumption as a "gossamer web self-spun without a scintilla of support to which one can point."

23. *See, e.g.*, Stiebitz v. Mahoney, 144 Conn. 443, 447-48, 134 A.2d 71, 74 (1957); Vickers v. Motte, 109 Ga. App. 615, 137 S.E.2d 77 (1965); Gildea v. Ellershaw, 363 Mass. 800, 820, 298 N.E.2d 847, 858-59 (1973); Morrill County v. Bliss, 125 Neb. 97, 111, 249 N.W. 98, 104 (1933).

to act.[24] In "ministerial" matters in which officials are thought to have no such discretion this fear is somewhat naively assumed to have no inhibiting effect.[25] At the federal level, public officials have acquired an absolute immunity to ordinary tort suits which prevents inquiries even into allegations of corruption or malice.[26] However, since federal officials enjoy only a qualified immunity for constitutional torts,[27] their degree of exposure to liability varies with the theory on which the tort claim is based.[28]

Although discussion of officer immunity has been dominated by the presumed impact of liability upon the performance by public officials of their discretionary functions, the case for immunity is strengthened by other considerations which apply to discretionary and nondiscretionary action alike. Holding public officials personally liable for all the consequences of their actions may be unfair. In the first place, the law often affirmatively requires officials, unlike private citizens, to take action associated with a strong likelihood of injury to others.[29] Certain high-risk services—fire and police protection, for example—have virtually no private law counterpart. Second, some governmental action is peculiarly inclined to affect the lives and fortunes of thousands of people. Concepts such as proximate cause, which enable courts to adjust the scope of liability in tort cases, may fail to protect officials from crushing financial burdens in cases involving many claimants. That these added objections to personal liability would seem to apply to nondiscretionary as well as discretionary action has not prevented most courts from confining officer immunity to acts of the latter kind. Thus, it seems that the courts are troubled chiefly by the danger of bridling the free exercise of judgment by public officials.[30]

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24. *See generally* W. PROSSER, *supra* note 14, at 988-89.

25. *See generally* David, *supra* note 3, at 152, 283-84; Jaffe, *supra* note 3, at 218.

26. *See* Barr v. Matteo, 360 U.S. 564, 574-75 (1959); Berberian v. Gibney, 514 F.2d 790 (1st Cir. 1975); Norton v. McShane, 332 F.2d 855 (5th Cir.), *cert. denied*, 380 U.S. 981 (1965); Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950); Cooper v. O'Connor, 99 F.2d 135 (D.C. Cir.), *cert. denied*, 305 U.S. 643 (1938). A similar immunity exists in California. *See* White v. Towers, 37 Cal. 2d 727, 235 P.2d 209, *cert. denied*, 305 U.S. 643 (1951).

27. *See, e.g.*, Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 456 F.2d 1339, 1346 (2d Cir. 1972) (holding police officers personally liable in damages for fourth amendment violations committed in the course of conducting an arrest or search, unless they can show that they acted "in good faith and with a reasonable belief in the validity" of their action). For cases predicating constitutional torts on the violation of other constitutional guarantees, see Brault v. Town of Milton, 527 F.2d 730 (2d Cir. 1975) (fourteenth amendment); Mark v. Groff, 521 F.2d 1376 (9th Cir. 1975) (fifth, sixth, and eighth amendments); Apton v. Wilson, 506 F.2d 83 (D.C. Cir. 1974) (fourth and fifth amendments).

28. Frequently, both common law and constitutional tort claims are raised in the same case. *See, e.g.*, Williams v. Gorton, 529 F.2d 668, 670-71 (9th Cir. 1976); Paton v. La Prade, 524 F.2d 862, 866-67 (3d Cir. 1975); Roberts v. Williams, 456 F.2d 819, 821 (5th Cir.), *cert. denied*, 404 U.S. 866 (1971).

29. *See* Van Alstyne, *Public Policy*, *supra* note 1, at 468-69; CALIFORNIA LAW REVISION COMM'N, RECOMMENDATION RELATING TO SOVEREIGN IMMUNITY 810 (1963).

30. Courts are particularly disturbed by the fact that officials who are invited to exercise discretion may later be held liable because a judge or jury disagrees with their action. *See* Scheuer v. Rhodes, 416 U.S. 232, 240 (1974); Smith v. Cooper, 256 Or. 485, 505-11, 475 P.2d 78, 88-90 (1970). *See generally* Mathes & Jones, *Toward a "Scope of Official Duty" Immunity for Police Officers in Damage Actions*, 53 GEO. L.J. 889, 912-14 (1965).

The dramatic rise in recent years in the number and scale of civil damage actions against government officials has heightened concern over the implications of officer liability.[31] Nevertheless, the courts continue to disagree on how best to resolve the tension between society's interest in compensating its injured and in keeping public officials unafraid. Thus they remain divided over the kind of immunity that public officials should enjoy. This division is especially apparent on the federal level. Influenced by scholarly criticism, as well as by the acceptance of qualified immunity in state law[32] and in federal civil rights[33] and constitutional tort[34] actions, the United States Court of Appeals for the Second Circuit recently held in *Economou v. United States Department of Agriculture*[35] that federal administrative officials are no longer entitled to absolute immunity from liability. The court found that immunizing officials only when they act in good faith and with a reasonable belief in the lawfulness of their action offers them adequate protection, and that the added security that absolute immunity would provide does not justify denying relief to the victims of bad faith or unreasonable conduct.[36] Shortly thereafter, a panel of the United States Court of Appeals for the District of Columbia Circuit adopted a similar position,[37] but that court, upon rehearing the case en banc, subsequently decided to reaffirm the rule of absolute immunity.[38] Since the *Economou* decision itself will be reviewed by the Supreme Court during its current Term,[39] clarification of federal law in this regard may soon be expected.

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31. *See* Norton v. Turner, 427 F. Supp. 138, 151 n.18 (E.D. Va. 1977); *Hearings on Supplemental Appropriations Bill of 1977 Before Subcomms. of the House Comm. on Appropriations*, 95th Cong., 1st Sess. 546, 559-60 (1977) [hereinafter cited as *House Supplemental Appropriations Hearings*]; Marro, *When Officials are Sued, Who Should Defend Them?*, N.Y. Times, Mar. 27, 1977, § 4 (News of the Week in Review) at 5, col. 4.

32. *See, e.g.*, Paoli v. Mason, 325 Ill. App. 197, 59 N.E.2d 499 (1945); State *ex rel.* Robertson v. Farmers' State Bank, 162 Tenn. 499, 39 S.W.2d 281 (1931).

33. *See, e.g.*, Wood v. Strickland, 420 U.S. 308 (1975); Scheuer v. Rhodes, 416 U.S. 232 (1974); Pierson v. Ray, 386 U.S. 547 (1967). These cases were brought under 42 U.S.C. § 1983 (1970), according to which any person acting "under color of" state law is liable in damages for depriving any other person of his constitutional or civil rights. They make the immunity of each public official from liability under § 1983 depend upon a balance between impairment of his performance as a result of his exposure to liability, on the one hand, and the remedial purposes of the statute, on the other. The incongruity between the absolute immunity under Barr v. Matteo, 360 U.S. 564 (1959), and the qualified immunity applicable to § 1983 actions has been noted by the courts. *See, e.g.*, Expeditions Unltd. Aquatic Enterprises, Inc. v. Smithsonian Inst., 566 F.2d 289, 299 (D.C. Cir. 1977) (en banc) (Robinson, J., concurring). *See generally Developments, supra* note 3, at 1155-56.

34. *See* note 27 *supra*.

35. 535 F.2d 688 (2d Cir. 1976), *cert. granted sub nom.* Butz v. Economou, 429 U.S. 1089 (1977) (No. 76-709).

36. *Id.* at 696.

37. Expeditions Unltd. Aquatic Enterprises, Inc. v. Smithsonian Inst., No. 74-1899 (D.C. Cir. June 28, 1976).

38. Expeditions Unltd. Aquatic Enterprises, Inc. v. Smithsonian Inst., 566 F.2d 289 (D.C. Cir. 1977) (en banc).

39. Butz v. Economou, 429 U.S. 1089 (1977), *granting cert. to* 553 F.2d 688 (2d Cir. 1976). This may also provide an occasion for the Supreme Court to address itself to the problem of the incongruity between the immunity standards applicable to the same official in common law and constitutional tort cases. *See* note 27 and accompanying text *supra*.

II. THE NEED FOR AN INTEGRATED SYSTEM OF GOVERNMENTAL TORT LAW

Because the doctrines of sovereign and officer immunity spring from distinct, if related, concerns, each has evolved independently. This continuing dissociation is not limited to jurisdictions that still lack general legislation on governmental tort liability.[40] Even when legislatures undertake to restructure governmental tort law from the bottom up, they tend to leave officer liability curiously out of the picture in important respects.

A. *The Coexistence of Governmental and Officer Liability*

In the first place, few statutory waivers of sovereign immunity address the threshold question of whether the introduction of governmental liability has the effect of immunizing the individual official.[41] Many state statutes say nothing on the subject,[42] though if litigation under the Federal Tort Claims Act is any guide, the courts will probably interpret them as leaving public officials exposed to personal liability.[43] Most statutes that deal with officer liability do so only obliquely by authorizing or requiring the government to purchase liability insurance on behalf of its officers and employees,[44] to

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40. For an outline of the states' varying statutory responses to this issue, see K. DAVIS, SEVENTIES, *supra* note 1, at 554-56.

41. *See, e.g.*, CAL. GOV'T CODE § 820 (West 1966) (official still liable); CONN. GEN. STAT. § 4-165 (West Supp. 1978) (no suits against officials except for "wanton or willful" misconduct); FLA. STAT. ANN. § 768.28(9) (West Supp. 1976) (officials liable only if they acted "in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property"); N.J. STAT. ANN. §§ 59:3-1, -14 (West Supp. 1977) (common law officer liability continues; nothing in statute meant to exonerate official for criminal activity, "actual fraud, actual malice or willful misconduct"); TENN. CODE ANN. § 23-3322 (Supp. 1977) (officials generally not subject to suit for damages for which governmental entity is liable); TEX. CIV. CODE tit. 6252-19, § 15 (Vernon 1970) (common law immunity continues).

42. *See, e.g.*, ALASKA STAT. § 09.50.250 (1977); HAW. REV. STAT. § 662-2 (Supp. 1975); ILL. ANN. STAT. ch. 37, § 439.8 (Smith-Hurd Supp. 1978); MICH. COMP. LAWS ANN. § 600.6419 (1968); OKLA. STAT. ANN. tit. 11, § 1753 (West Supp. 1977).

43. *See* D. SCHWARTZ & S. JACOBY, LITIGATION WITH THE FEDERAL GOVERNMENT § 14.106 at 233 (1970) [hereinafter cited as FEDERAL LITIGATION]. The provision of the Federal Tort Claims Act to the effect that "judgment in an action under [the Act] shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim," 28 U.S.C. § 2676 (1970), strongly suggests that, until judgment, suit may be brought against the officer.

Where independent federal jurisdiction exists, plaintiff may join the official as party defendant to a suit brought in federal district court against the United States under the Federal Tort Claims Act. *See* Benbow v. Wolf, 217 F.2d 203 (9th Cir. 1954). *Cf.* Morris v. United States, 521 F.2d 872, (9th Cir. 1975); Williams v. United States, 405 F.2d 951, 953-54 (9th Cir. 1969) (supporting joinder rule but finding no independent federal jurisdiction existed). *See generally* W. PROSSER, *supra* note 14, § 47, at 295-96. One complication of joinder on the federal level is that a jury trial may be necessary with respect to the claim against the official, but not with respect to the claim against the government. *See* 28 U.S.C. § 2402 (1970). This may lead on occasion to inconsistent verdicts. *See* D. SCHWARTZ & S. JACOBY, GOVERNMENT LITIGATION 503 (1963) [hereinafter cited as GOVERNMENT LITIGATION].

The fact that a litigant has sued the official and obtained a judgment against him is not a bar to suing the government on a similar claim in a later action, though satisfaction of either judgment operates to satisfy the other. *See* Moon v. Price, 213 F.2d 794 (5th Cir. 1954); United States v. First Sec. Bank, 208 F.2d 424, 428 (10th Cir. 1953).

44. For provisions authorizing the purchase of such insurance, see IND. CODE ANN. § 34-4-16.5-18 (Burns Supp. 1977); IOWA CODE ANN. § 613A.7 (West Supp. 1977);

provide individual defendants with a free defense in damage suits arising out of their official action,[45] or to pay judgments rendered against them.[46]

Assuming that the advent of governmental liability does not bar litigants from suing public officials in their individual capacity, a number of important procedural questions arise. If a prospective plaintiff must give the government formal notice of his tort claim before bringing suit against it, must he also notify the government when he intends to sue one of its officers or employees instead?[47] Do special courts or commissions that have been established to decide governmental tort claims have jurisdiction over actions against individual officials arising out of the same set of facts, and if so, is that jurisdiction concurrent or exclusive?[48] Few statutes answer such questions.

B. *The Coextensiveness of Governmental and Officer Tort Liability*

The more difficult problem is whether the liability of public officials should be coextensive as well as coexistent with governmental liability. The solution depends not only upon whether the action is regarded as tortious irrespective of whom the plaintiff chooses to sue, but also upon how the term "scope of authority" is defined and whether the term "discretionary" is given the same meaning for purposes of both governmental and officer immunity. Unfortunately, few tort claims statutes take any position on these points.[49]

NEV. REV. STAT. § 41.038 (1977); N.Y. GEN. MUN. LAW § 52 (McKinney 1977); OKLA. STAT. ANN. tit. 11, § 1757 (West 1976); TEX. CIV. CODE ANN. tit. 6252-19, § 9 (Vernon 1970). For provisions requiring the purchase of such insurance, see IDAHO CODE § 6-919 (Supp. 1977); ILL. ANN. STAT. ch. 127, § 35.9(h) (Smith-Hurd Supp. 1978); VT. STAT. ANN. tit. 29, § 1401 (1970).

45. For examples of legislation authorizing the government to defend its officers, see FLA. STAT. ANN. § 111.07 (West 1975) (except for action taken "in bad faith, with malicious purpose, or in a manner exhibiting wanton and willful disregard of human rights, safety, or property"); MICH. COMP. LAWS ANN. § 691.1408 (1968); MINN. STAT. ANN. § 466.07(1), (2) (West 1977) (except for "malfeasance in office or willful or wanton neglect of duty"); N.Y. PUB. OFF. LAW § 17(2) (McKinney Supp. 1977); N.C. GEN. STAT. §§ 143-300.3, 300.4(a)(2) (1974) (except for "actual fraud, corruption or actual malice"). For examples of statutes requiring the government to do so, see IDAHO CODE § 6-903(b), (c) (Supp. 1977) (except for conduct showing "malice or criminal intent"); IOWA CODE ANN. §§ 25A.21, 613A.8 (West Supp. 1977); OR. REV. STAT. §§ 30.285(3), 30.287(1) (1975) (except for "malfeasance in office or willful or wanton neglect of duty"); VT. STAT. ANN. tit. 3, § 1101(a) (Supp. 1977); WASH. REV. CODE ANN. § 4.92.070 (Supp. 1976) (only for "good faith" conduct).

46. For examples of legislation authorizing the government to pay judgments against its officers, see ILL. ANN STAT. ch. 85, § 2-302 (Smith-Hurd 1966); IND. CODE ANN. § 34-4-16.5-5(b) (Burns Supp. 1977); MICH. COMP. LAWS. ANN. § 691.1408 (1968). For provisions requiring the government to do so, see note 97 *infra*.

47. *See, e.g.*, Schiavone v. Nassau County, 41 N.Y. 2d 844, 362 N.E.2d 252, 393 N.Y.S.2d 701 (1977); Fitzgerald v. Sanitation Dist. No. 6, 89 Misc. 2d 1078, 393 N.Y.S.2d 542 (City. Ct. 1977). *See generally* CALIFORNIA LAW REVISION COMM'N, *supra* note 29, at 1016-17. A few statutes provide a specific answer to the question. *See, e.g.*, MINN. STAT. ANN. § 3.736(5) (West 1977).

48. For recent examples of litigation over this question, see Abbott v. Secretary of State, 67 Mich. App. 344, 240 N.W.2d 800 (1976); DeVivo v. Grosjean, 48 App. Div.2d 158, 368 N.Y.S.2d 315 (1975).

49. *See, e.g.*, ALASKA STAT. § 09.50.250 (1976). Under statutes which immunize the government from liability whenever the official involved is immune, the term "discretionary,"

The matter is further complicated by the fact that nearly every general waiver of governmental immunity contains, in addition to a broad discretionary acts exemption, a list of specific tort claims that remain barred.[50] With a few exceptions, state tort claims statutes do not indicate what bearing such exemptions have upon the common law immunity of public officials.[51] In the absence of legislative guidance, the courts have gone in different directions on this basic issue. Some, insisting on a strict separation between governmental and officer liability, deny individual officials any benefit of the government's statutory immunities.[52] This might lead to the curious result of holding an official personally liable for the good faith execution of a statute, even though the jurisdiction's tort claims statute immunizes the government against precisely such a claim.[53] Other courts have gone to the opposite extreme by assuming an almost axiomatic correlation between the exemptions from governmental and officer liability. In a few instances, this assumption may be justified by statutory language suggesting that the government should enjoy immunity whenever its officials enjoy it,[54] or vice versa.[55] But some courts have adopted this view without the benefit of statutory guidance,[56] and usually without addressing the policy issues involved.

Even in the absence of any statutory framework, a few courts have made serious attempts to coordinate governmental and officer liability. The

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by definition, has the same meaning in both contexts. *See, e.g.*, CAL. GOV'T CODE § 815.2(b) (West 1966). For a recent judicial suggestion that the term might be defined differently depending upon whether governmental or officer immunity is at stake, see Smith v. Cooper, 256 Or. 485, 497, 501, 475 P.2d. 78, 84, 86 (1970).

50. Among the more common examples are exclusions of liability in connection with the inspection of real property, *see, e.g.*, N.J. STAT. ANN. § 59:3-7 (West Supp. 1977), the issuance of licenses, *see, e.g., id.* § 59:3-6, and the enforcement of an unconstitutional statute or regulation, *see, e.g., id.* § 59:3-4.

51. *See, e.g.*, ALASKA STAT. § 09.50.250 (1976); HAW. REV. STAT. §§ 662-14, -15 (Supp. 1975). *But see* IND. CODE ANN. § 34-4-16.5-3 (Burns Supp. 1977) (setting forth a list of exclusions common to both governmental and officer liability). *See also* MINN. STAT. ANN. § 3.736(3) (West 1977); N.J. STAT. ANN. §§ 59:2-3, 3-2 (West Supp. 1977); OR. REV. STAT. § 30.265(3) (1975).

52. *See* Boyer v. Chaloux, 288 F. Supp. 366, 370 (N.D.N.Y. 1968); Tocco v. Piersante, 69 Mich. App. 616, 621, 245 N.W.2d 356, 359 (1976); Rhynders v. Greene, 255 App. Div. 401, 402, 8 N.Y.S.2d 143, 144 (1938); Fiebinger v. City of New York, 182 Misc. 1007, 1010-11, 51 N.Y.S.2d 383, 385 (Sup. Ct. 1944). On the other hand, the courts have also held that legislative abrogation of governmental immunity does not necessarily imply abrogation of officer immunity as well. *See* Smith v. Cooper, 256 Or. 485, 494-95, 475 P.2d 78, 83 (1970).

53. *See* Henke, *Oregon's Governmental Tort Liability Law from a National Perspective*, 48 ORE. L. REV. 95, 121 (1968) (citing OR. REV. STAT. § 30.265(d) (1975) and Gearin v. Marion County, 110 Or. 390, 396-97, 223 P. 929, 931-32 (1924)).

54. *See, e.g.*, Thiele v. Kennedy, 18 Ill. App. 3d 465, 467, 309 N.E.2d 394, 395-96 (1974) (citing ILL. REV. STAT. ch. 85, § 2-109 (Smith-Hurd 1966)); Blanchard v. Town of Kearny, 145 N.J. Super. 246, 249, 367 A.2d 464, 465-66 (Law Div. 1976) (citing N.J. STAT. ANN. § 59:2-2(b) (West Supp. 1977)).

55. This would seem to be the import of tort claims statutes giving equal treatment to damage actions whether brought against the state or against its officers. *See, e.g.*, IOWA CODE ANN. § 25A.2(5) (West Supp. 1977).

56. *See, e.g.*, Creelman v. Svenning, 67 Wash.2d 882, 885, 410 P.2d 606, 608 (1966). *See generally* Jaffe, *supra* note 3, at 213. Some courts have suggested that if the government is exposed to liability, its officers should be exposed to liability as well. *See, e.g.*, Foyster v. Tutuska, 44 Misc.2d 303, 304-05, 253 N.Y.S.2d 634, 636-37 (Erie County Ct. 1964), *rev'd on other grounds*, 25 App. Div. 2d 940, 270 N.Y.S.2d 535 (1966).

decision of the District of Columbia Circuit in *Carter v. Carlson*[57] illustrates the magnitude of the task. In that case, plaintiff, alleging that he had been arrested by a District of Columbia police officer without probable cause and then beaten with brass knuckles, sued the officer, who was never found for service of process, his precinct captain, the Chief of Police, and the District of Columbia. In reversing the district court's summary dismissal, Judge Bazelon observed for the majority that common law immunity for discretionary acts does not extend to torts committed by police officers in the course of making an arrest.[58] However, since the arresting officer was not a party, the court turned immediately to the possible liability of the captain and Chief of Police. In keeping with the common law rule, it held that they would be entitled to immunity only if their supervision and training of the officer amounted to discretionary action, a matter to be decided by the district court.[59]

The court then examined the liability of the sovereign, the District of Columbia. It observed that while the District's direct liability for inadequately training or supervising police officers likewise depended upon the discretionary nature of those responsibilities,[60] the District might also be vicariously liable for the torts of its officials. On this point, the court took the categorical view that if an arresting officer is not immune from liability for the torts he commits in making an arrest, then the government employing him should not be immune from liability for them either: "If the arresting officer himself is subject to suit for his tort, it is hard to conceive of any substantial additional threat to the efficiency of government that would result from subjecting the District to suit as well."[61]

Finally, the court considered the government's potential vicarious liability for the conduct of the captain and Chief of Police. It held first that, as in the case of the arresting officer, if the captain or Chief of Police were liable, the District of Columbia should automatically be liable as well. In its view, if the threat of personal liability did not impair the officers' performance of duty, the threat of governmental liability could not do so.[62] But the court went still further, suggesting that the lower court might still hold the District of Columbia vicariously liable for the actions of the captain

57. 447 F.2d 358 (D.C. Cir. 1971), *rev'd on other grounds sub nom.* District of Columbia v. Carter, 409 U.S. 418 (1973).

58. *Id.* at 362-63.

59. *Id.* at 364. The court noted that even if the captain or chief were protected from liability at common law, they might both be subject to suit under 42 U.S.C. § 1983 (1970) for deprivation of plaintiff's constitutional rights, since that statute does not imply a broad common law immunity for all government officers exercising discretionary functions. *Id.* at 365. The Supreme Court reversed the court of appeals on this point, holding that the District of Columbia is not a "State or Territory" within the meaning of § 1983. District of Columbia v. Carter, 409 U.S. 418 (1973).

60. 447 F.2d at 358.

61. *Id.* at 366.

62. *Id.* at 367.

and Chief even if they were found to enjoy personal immunity. This depended upon a policy judgment to be made by the lower court:

> With respect to some government functions, the threat of individual liability would have a devastating effect, while the threat of government liability would not significantly impair performance. If the trial court determines that this is such a case, then the officers, but not the District, will be entitled to immunity at common law.[63]

A second notable effort at integrating governmental and officer liability was made by the California Supreme Court in *Lipman v. Brisbane Elementary School District*.[64] In that case, a superintendent of schools brought a damage action against the school district and three of its trustees alleging in part that the trustees had made defamatory statements concerning her official conduct to the press, to members of the public, and to government officials engaged in investigating charges of misconduct against her. The court ruled that the trustees' cooperation in the investigation was a discretionary activity entitling them to absolute immunity from suit.[65] Nevertheless, it held that they might still be liable with respect to statements made to the press and public, since making those statements lay beyond the scope of their authority.[66] On the other hand, precisely for that reason, the school district could not be made to answer for them.[67]

Significantly, as in *Carter*, the court advanced the converse proposition that the government might be liable for injury caused by its officials even when the latter are personally immune. It considered it "unlikely that officials would be as adversely affected in the performance of their duties by the fear of liability on the part of their employing agency as by the fear of personal liability."[68] However, the court ultimately decided to extend immunity to the school district. While it did not explain this decision, the court presumably feared that exposing the district to liability would have too adverse an effect on the trustees.[69]

Although the *Carter* and *Lipman* opinions squarely confront the problem of the coextensiveness of governmental and officer liability, they do not offer entirely satisfactory solutions. On the first issue—whether the

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63. *Id.* Recognizing the "conceptual difficulty with the notion of imposing vicarious liability on the District for the conduct of officers who are not themselves subject to liability," Judge Bazelon noted that under principles of respondeat superior, a master may assert his servant's substantive defenses, but not his immunity to suit. *Id.* at 367 n.26.

64. 55 Cal.2d 224, 359 P.2d 465, 11 Cal. Rptr. 97 (1961). The decision was rendered on the same day that the court discarded the state's common law rule of sovereign immunity. *See* Muskopf v. Corning Hosp. Dist., 55 Cal.2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961).

65. *Id.* at 230, 233, 359 P.2d at 467, 469-70, 11 Cal. Rptr. at 99, 101-02.

66. *Id.* at 234, 359 P.2d at 470, 11 Cal. Rptr. at 102.

67. *Id.* at 230, 359 P.2d at 468, 11 Cal. Rptr. at 100.

68. *Id.* at 229-30, 359 P.2d at 467, 11 Cal. Rptr. at 99.

69. "There is a vital public interest in securing free and independent judgment of school trustees in dealing with personnel problems, and trustees, being responsible for the fiscal well-being of their districts, would be especially sensitive to the financial consequences of suits for damages against the districts." *Id.*

existence of officer liability necessarily implies governmental liability—the California court, but not the District of Columbia Circuit, expressly excepted the situation in which a public official acts beyond the scope of his authority.[70] While the meaning of the term "scope of authority" for these purposes is less than clear, some such exclusion is useful in relieving the government of liability where its connection to the tort is too remote.[71] Moreover, the District of Columbia Circuit assumed without discussion that the government should not be relieved of liability simply because the official acted willfully or wantonly within the scope of his authority.[72] The *Lipman* Court did not entertain the question. Although we may ultimately conclude that the government should be liable even in such situations,[73] the matter deserves more careful consideration. Finally, there may be independent reasons in a given case for limiting or excluding governmental liability that have little if anything to do with the danger of inhibiting public officials. Such reasons include fiscal considerations and the inappropriateness of judicial involvement in political decisionmaking.[74] Any automatic inference of governmental liability from officer liability may obscure such factors.

The converse position adopted by both the *Carter* and *Lipman* courts —that under certain circumstances the government should be liable for the torts committed by its officers though the officers themselves are not liable— rests on firmer ground.[75] Even if we may assume that the prospect of gov-

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70. Because the defendants in *Carter* did not allege that the arresting officer had acted beyond the scope of his authority, the issue was not reached. *See* 447 F.2d at 361.

71. *See, e.g.*, Barr v. Matteo, 360 U.S. 564, 573-74 (1959). Whether the *Lipman* court decided the "scope of authority" issue properly is of course another matter. For example, it apparently gave no consideration to the question of whether the trustees knew or reasonably should have known that making statements about the superintendent to the press and public exceeded the scope of their authority. However great the need for compensation in any given case, it may be unfair to impose exclusive liability on the individual officer for honest and excusable misjudgments of this kind.

72. According to Judge Bazelon, "When a tort is made possible only through the abuse of power granted by the government, then the government should be held accountable for the abuse, whether it is negligent or intentional in character." 447 F.2d at 366.

73. The view that a master may be held vicariously liable for the intentional torts of his servants has gained broad acceptance. *See* 2 F. HARPER & F. JAMES, *supra* note 5, at §§ 26.9, 29.13; W. PROSSER, *supra* note 14, § 70, at 464-66; RESTATEMENT (SECOND) OF AGENCY §§ 245-49 (1958).

74. *See* 2 F. HARPER & F. JAMES, *supra* note 5, § 29.15, at 1661-65.

75. In recent years, a number of other courts have adopted this view. *See, e.g.*, Downs v. United States, 522 F.2d 990, 998 (6th Cir. 1975); Bridges v. Alaska Hous. Auth., 375 P.2d 696 (Alas. 1962); Krause v. State, 28 Ohio App. 2d 1, 8, 274 N.E.2d 321, 326 (1971), *rev'd on other grounds*, 31 Ohio St. 2d 132, 285 N.E.2d 736, *appeal dismissed*, 409 U.S. 1052 (1972). *Cf.* Smith v. Cooper, 256 Or. 485, 493-95, 475 P.2d 78, 82-83 (1970) (by implication). However, shortly after the *Lipman* decision, the California Law Revision Commission urged the legislature to immunize the government explicitly from liability whenever its officers and employees are immune. Such a provision was included in the state's new tort claims legislation. CAL. GOV'T CODE § 815.2(b) (West 1966). For similar provisions, see ILL. REV. STAT. ch. 85, § 2-109 (Smith-Hurd 1966); N.J. STAT. ANN. § 59:2-2(b) (West Supp. 1977).

In a recent decision holding that the government would be liable for the constitutional torts of law enforcement officers, even though the latter might be immune, the court relied heavily on legislative history of the 1974 Amendments to the Federal Tort Claims Act,

ernmental liability in damages will trouble any official who is sensitive to the disfavor of his superiors, it should not dampen his zeal nearly as much as the prospect of personal liability. Unless the government's exposure to liability can genuinely be expected to impair seriously the official's performance of duty, the government should not enjoy immunity from liability simply because the official is immune.

More important, as a policy matter, any rigid equation of governmental with officer immunity assumes a happy congruence between the compensatory purposes of tort law, on the one hand, and its deterrent and retributive purposes, on the other, that simply does not exist. Situations frequently arise in which it is appropriate to require the government to compensate for harm done by a public official, even though it is inappropriate to hold the official personally liable. For example, in the well-known case of *Miller v. Horton*,[76] a state health officer, acting under a statute requiring him to destroy horses infected with glanders, ordered plaintiff's horse put to death in the reasonable though mistaken belief that it had the disease. Imposing liability on the government rather than the innocent officer in that case would have provided the victims a remedy, while distributing the loss over the entire community in whose interest the program was presumably initiated. This would have been a fair and sensible result. Moreover, even if an official has acted culpably, placing the full monetary burden on his shoulders may be out of proportion to his fault. Consider the case of a municipal power plant operator whose slight delay in responding to danger signals paves the way for a blackout with untold financial consequences for the entire community.

A further justification for accepting a broader scope of governmental than officer liability is that some losses occasioned by governmental activity may not be traceable to any particular official. For example, legislation may impose duties upon the government that the latter simply fails to implement. Some state tort statutes now deal explicitly with this situation by establishing governmental liability in damages for failure to exercise reasonable diligence to carry out the law.[77] More generally, however, a governmental operation may suffer from inefficiency, delay or other systemic disorders that cannot be laid at the feet of any particular official yet still cause injury that warrants compensation.

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codified at 28 U.S.C. § 2680(h) (Supp. V 1975). Norton v. Turner, 427 F. Supp. 138, 146-50 (E.D. Va. 1977).

The view that governmental immunity should be narrower than officer immunity has found support in the literature. *See, e.g.*, K. DAVIS, ADMINISTRATIVE LAW TREATISE § 25.17 (Supp. 1970). *See also* 2 F. HARPER & F. JAMES, *supra* note 5, at § 29.15.

76. 152 Mass. 540, 26 N.E. 100 (1891) (Holmes, J.). For a decision immunizing the official, but not the public entity, in such a situation, see Bridges v. Alaska Hous. Auth., 375 P.2d 696 (Alas. 1962).

77. *E.g.*, CAL. GOV'T. CODE § 815.6 (West 1966).

C. *The Allocation of Liability*

Even assuming a perfect correlation between the tort liability of the government and its officials, the problem remains of allocating the burden between them in any given case. Indeed, this problem may arise as long as there is any overlap in liability. In situations in which both the government and the individual official are sued for torts committed by the official while acting within the scope of his authority, courts may have to resort to common law or statutory principles of responsibility among joint tortfeasors in deciding whether and to what extent apportionment of damages or contribution is appropriate.[78] Application of such general rules in the peculiar context of governmental torts may produce individual results that are undesirable for reasons discussed earlier.[79] Moreover, the official may have acted in whole or in part beyond the scope of his authority, and to that extent he should be exclusively liable. Matters become still more complex when the government is directly rather than vicariously liable, as in cases in which it breaches an independent duty to supervise its officers and employees or where the deficiency complained of is basically systemic in character.[80]

The fact that litigants frequently sue only the government, on the assumption that its pocket is invariably broader and deeper, does not dispose of these difficulties. If the litigant recovers, the common law may entitle the government to indemnification from the official in whole or in part.[81] Conversely, if a litigant chooses to make the individual official his sole defendant, and prevails on the merits, that official too may have a common law right of recovery against the government.[82] Until recently, tort claims legislation ignored this aspect of the allocation problem. The silence of the Federal Tort Claims Act, for example, left it for the courts to decide that the Act confers neither upon the negligent federal official[83] nor upon the United States[84] a right of indemnity against the other. Recent state

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78. *See* F. HARPER & F. JAMES, *supra* note 5, §§ 10.1, 10.2, 20.3; W. PROSSER, *supra* note 14, § 50, at 305-07, § 52; FEDERAL LITIGATION, *supra* note 43, at 210.

79. *See* notes 29-30 and accompanying text, *supra*.

80. *See* 1 F. HARPER & F. JAMES, *supra* note 5, § 10.1, at 699 n.49; text accompanying note 77 *supra*.

81. The common law entitles one who is vicariously liable for the harm done by another person to complete indemnity from the latter. *See* 1 F. HARPER & F. JAMES, *supra* note 5, at 723; note 141 *infra*.

82. This will most often be the case where the employee acts at the specific direction of the employer and in justifiable reliance on the lawfulness of his action. *See* Sorge v. City of New York, 56 Misc.2d 414, 419, 288 N.Y.S.2d 787, 794-95 (Sup. Ct. 1968) (employee has right to complete indemnity if not *in pari delicto* with employer). 1 F. HARPER & F. JAMES, *supra* note 5, at 725. *But see* Fiebinger v. City of New York, 182 Misc. 1007, 1010-11, 51 N.Y.S.2d 383, 385 (Sup. Ct. 1944). Pursuit by a public official of a right of indemnification from the government may be precluded by the sovereign immunity doctrine where it is still in effect.

83. *See* Uptagrafft v. United States, 315 F.2d 200 (4th Cir.), *cert. denied*, 375 U.S. 818 (1963). However, a joint tortfeasor may sue the United States for contribution under the Act. United States v. Yellow Cab Co., 340 U.S. 543 (1951).

84. *See* United States v. Gilman, 347 U.S. 507 (1954). *See* notes 140-42 and accompanying text *infra*. Even under *Gilman*, however, the United States may implead an insurer

legislation is more explicit. Some statutes require the government, within stated limitations, to pay judgments rendered against its officials or to indemnify the latter for judgments they have already paid.[85] Others entitle an official who is sued to a free legal defense by government attorneys[86] or to reimbursement of his litigation costs.[87] On the other hand, state legislation frequently provides the government with a limited right of indemnity against its officials both for judgments it has had to pay as a result of their misconduct[88] and for the litigation costs involved.[89]

The ill-defined relationship between governmental and officer liability at common law and, to a lesser extent, under tort claims legislation, calls for remedial action. First, on a practical level, prospective plaintiffs need a clearer idea than they can possibly have today of the monetary responsibility of governments and their officials. The current proliferation of defendants in damage actions against public authorities may not be due entirely to nuisance value, but may owe something to litigants' honest uncertainty over what relief if any can be expected from whom. Second, confusion over the relationship between governmental and officer liability has serious implications for the courts, for it compels them to cope with the intricate problems of coordination discussed in this section on a cumbersome case by case basis. Third, such confusion leaves essentially unresolved that imponderable with which the law seems so concerned—the impact upon public officials of the threat of personal liability.[90] Admittedly, the difficulty of devising a formula that will maximize the putative benefits of fear, while minimizing its harm, can scarcely be exaggerated. But even in the absence of further empirical research, common sense admonishes against choosing a system in which the climate of fear is too unpredictable either to tame the reckless or to allow the timid to act.

Clearly, the task of balancing the interests relevant to governmental tort litigation is legislative in character. The following section explores some statutory alternatives to the pattern of vaguely parallel governmental and officer tort liability that prevails today.

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as third party defendant in a pending tort action, provided the government is the insured under a policy covering injury caused by the official involved. GOVERNMENT LITIGATION, *supra* note 43, at 490.

85. *See* notes 96-97 *infra.*

86. *See* note 45 *supra.*

87. *See, e.g.*, CAL. GOV'T CODE § 996.4 (West 1966) (except in cases of "actual fraud, corruption or actual malice"); CONN. GEN. STAT. ANN. § 4-16a (West Supp. 1978) (except in cases of "wanton, reckless, or malicious" acts); UTAH CODE ANN. § 63-48-4 (Supp. 1977) (except in cases of "gross negligence, fraud, or malice").

88. *See, e.g.*, CAL. GOV'T CODE § 825.6 (West Supp. 1977) (in cases of "actual fraud, corruption or actual malice"); IDAHO CODE § 6-903(d) (Supp. 1977) (in cases showing "malice or criminal intent"); NEV. REV. STAT. § 41.0337(9) (1977) (in cases of "wanton or malicious" conduct); UTAH CODE ANN. § 63-48-5(2) (Supp. 1977) (in cases of "gross negligence, fraud, or malice").

89. *See, e.g.*, IDAHO CODE § 6-903(d) (Supp. 1977) (in cases of "malice or criminal intent"); ORE. GEN. STAT. §§ 30.285(5), .287(3) (1975) (in cases of "wilful or wanton neglect of duty").

90. *See* notes 22, 24-25 and accompanying text *supra.*

III. Alternative Models for Integrating Governmental and Officer Tort Liability

The serious difficulty created by the dissociation between governmental and officer tort law suggests the advantage of a model based primarily upon the liability of either the individual official or the governmental entity.

A. *Officer Based Liability*

1. *Exclusive Officer Liability.* Whatever its merits from the point of view of individual deterrence, any approach to governmental tort law based exclusively on officer liability raises serious objections. The most important of these is the probable frustration of tort law's compensatory purposes. Unless all public officials are made to carry a generous quantity of liability insurance,[91] or governments are made to carry it for them,[92] their frequent incapacity to satisfy large judgments would make any such system unacceptable.[93] Furthermore, wherever the line between too much and too little fear of liability may be drawn, holding public officials exclusively liable for tort claims arising out of governmental activity is likely at times to dissuade them from taking prompt and decisive action.

2. *Officer Liability with Indemnification.* During the period in which the sovereign immunity doctrine effectively shielded the government from tort liability, any effort to accommodate the various interests at stake proceeded from the premise that the individual official, if anyone, would be primarily liable for government-inflicted injury. The heavy burden thus imposed on the official might then be alleviated through full or partial indemnification by the government.[94] Today, statutes frequently authorize[95]

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91. *See* Van Alstyne, *Public Policy*, *supra* note 1, at 490-91. Another means of ensuring that public officials are not judgment-proof is to require them to post a faithful performance bond in favor of persons they injure. *See, e.g.*, CAL. GOV'T CODE §§ 1480-81, 1550 (West 1966).

92. *See* note 44 *supra.*

93. *See* Jennings, *supra* note 3, at 293. *See also* Davis, *supra* note 3, at 212.

94. The practice of reimbursing public officials for their payment of service-related judgments has a long history. As early as 1805, Congress enacted a private bill indemnifying the captain of the frigate Constellation for damages awarded against him by a federal court for the tortious seizure of a private schooner. Act of Jan. 31, 1805, Statute II, ch. 12, 6 Stat. 56 (1805). The decision was Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804). Some 30 years later, the Supreme Court suggested that federal officials had a general right of indemnity against the government for liabilities arising out of their good faith performance of duty. Tracy v. Swartwout, 35 U.S. (10 Pet.) 79, 97-98 (1836). *Accord*, Cary v. Curtis, 44 U.S. (3 How.) 236, 263 (1845).

95. *See, e.g.*, ILL. ANN. STAT. ch. 85, § 2-302 (Smith-Hurd 1966); MICH. COMP. LAWS ANN. § 691.1408 (1968); MINN. STAT. ANN. § 466.07(1), (2) (West 1977) (except in cases of "malfeasance in office or wilful or wanton neglect of duty"); OKLA. STAT. ANN. tit. 11, § 1758 (West Supp. 1977) (except in cases of "malfeasance in office, wilful or wanton neglect of duty").

To counter any argument that indemnification amounts to paying the personal obligations of public officials and therefore violates constitutional prohibitions against the personal use of public funds, some recent state legislation expressly declares that payment by the government of claims arising out of the tortious conduct of public officials shall be considered to have been done for a valid public purpose. *See, e.g.*, UTAH CODE ANN. § 63-30-27 (Supp. 1977); WASH. REV. CODE ANN. § 4.92.170 (Supp. 1977).

or even compel[96] the government to indemnify its officers. A few state legislatures have taken the logical next step of requiring the government to satisfy those judgments directly.[97] Even in the absence of any such statute some courts have recognized a limited common law right of idemnity.[98]

Virtually every existing right of indemnity enjoyed by public officials is subject to exclusions not only for action beyond the outer perimeters of their authority, but also for egregious action within those preimeters. Egregious action has been defined variously,[99] but each definition seeks to ensure that the individual official ultimately bears personal liability in those situations where the need for deterrence and retribution is greater.

The most curious aspect of indemnification may be the widespread assumption among scholars that it is in fact practiced. Professor Jaffe, for example, is probably correct in suggesting that plaintiffs often bring damage actions against public officials as an indirect means of reaching public funds;[100] but he further assumes that the government actually reimburses its officials for judgments they have paid, arguing from this premise that the prospect of personal tort liability serves no real deterrent purpose.[101] Yet, the assumption that the government generally indemnifies its officials for service-related judgments, or pays those judgments for them, may not be warranted. The federal government, for example, does so only in the narrow category of cases in which Congress has authorized the practice expressly.[102] Though the Constitution is silent on the subject, the Justice

96. *See, e.g.*, CAL. GOV'T CODE § 825.2 (West Supp. 1977) (except for "actual fraud, corruption or actual malice"); CONN. GEN. STAT. ANN. § 4-16a (West Supp. 1978) (except in cases of "wanton, reckless, or malicious" acts); IOWA CODE ANN. §§ 25A.21, 613A.8 (West Supp. 1977) (except for "willful or wanton" conduct); N.Y. GEN. MUN. LAW § 50b-4 (McKinney 1977); N.Y. PUB. OFF. LAW § 17(1) (McKinney Supp. 1977) (except for "willful and wrongful act or gross negligence"); OR. REV. STAT. § 30.285(1), (2) (1975) (except for "malfeasance in office or wilful or wanton neglect of duty"); UTAH CODE ANN. § 63-48-4 (Supp. 1977) (except for "gross negligence, fraud, or malice").

97. *See, e.g.*, CAL. GOV'T CODE § 825 (West Supp. 1977); CONN. GEN. STAT. ANN. § 7-465 (West Supp. 1978) (except for "wilful or wanton" acts); FLA. STAT. ANN. § 768.28(9) (West Supp. 1977); UTAH CODE ANN. § 63-48-3(4) (Supp. 1977) (except for "gross negligence, fraud, or malice").

98. *See* note 82 *supra*. The problem has also arisen in connection with actions brought under 42 U.S.C. § 1983 (1970), which is silent on the indemnification question. A minority of courts have accorded officials successfully sued under the statute a right of recovery against the government, at least when they acted in good faith and within the scope of their authority. *See, e.g.*, Courtney v. School Dist. No. 1, 371 F. Supp. 401 (D. Wyo. 1974); Hill v. Toll, 320 F. Supp. 185, 188-89 (E.D. Pa. 1970). *Contra*, Thompson v. McCoy, 425 F. Supp. 407, 410-11 (D.S.C. 1976). *See generally* Note, *Vicarious Liability under Section 1983*, 6 IND. L. REV. 509 (1973) [hereinafter cited as *Vicarious Liability*].

99. *See* notes 149 and 156 *infra*.

100. Jaffe, *supra* note 3, at 216-17. *See generally* L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 238-39 (abr. ed. 1965).

101. Jaffe, *supra* note 3, at 217. *See* Johnson v. State, 69 Cal.2d 782, 790, 447 P.2d 352, 358-59, 73 Cal. Rptr. 240, 246-47 (1968); Fuller & Casner, *Municipal Tort Liability in Operation*, 54 HARV. L. REV. 437, 451-53 (1941).

102. *See, e.g.*, 10 U.S.C.A. § 1089(f) (West Supp. 1977); 22 U.S.C.A. § 817(f) (West Supp. 1977); 38 U.S.C.A. § 4116(e) (West Supp. 1977); 42 U.S.C. § 233(f) (1970); 42 U.S.C.A. § 2458(f) (West Supp. 1977) (liability for personal injury or death attributable to action of certain medical personnel of armed forces, Defense Department, Central Intelligence Agency, State Department, Veterans' Administration, Public Health Service and National Aeronautics and Space Administration, where no direct remedy available against United States); 26 U.S.C. § 7423 (1970) (liability for wrongful collection of internal revenue).

Department has taken the view that paying the judgments of federal officials in any other case would be an unauthorized expenditure of public funds.[103] Until now, the most the federal government has been willing to do is to pay in full those judgments rendered jointly against it and one of its officials and to release the official from any further liability.[104]

To some extent, confusion may stem from the failure to distinguish between payment of judgments, on the one hand, and provision of a free legal defense, on the other. Rare circumstances aside,[105] the Justice Department normally will offer a federal official the free services of its own attorneys, provided he was acting within the scope of his authority at the time the injury occurred.[106]

Cases arise, however, in which the Justice Department declines to defend a federal official even in a service-related action. One example is where a federal criminal indictment or information has been issued against an official with respect to the same acts which underlie the tort action.[107] Though the Department's chief concern in such a situation is avoiding a a conflict of interest between its civil and criminal divisions,[108] it also justifies its refusal to defend on the ground that doing so would serve no valid governmental interest.[109] Even if the Department determines that an official

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103. *See Hearings on Supplemental Appropriations Bill of 1977 Before Senate Comm. on Appropriations*, 95th Cong., 1st Sess. 861 (1977) [hereinafter cited as *Senate Supplemental Appropriations Hearings*]. The Attorney General's recent appeal to Congress for authority to satisfy service-related judgments against law enforcement and intelligence officers reflects this understanding. Address by Attorney General Bell, American Bar Association, Judicial Administration Division, Annual Meeting (Aug. 8, 1977) [hereinafter cited as Bell Address]. *Cf.* Martinez v. Schrock, 537 F.2d 765 (3d Cir. 1976), *cert. denied*, 430 U.S. 920 (1977) (reason for giving military doctors absolute immunity from suit for medical malpractice is their modest income and fact that they are not entitled to indemnification by the government).

104. *See* Dep't of Justice Memorandum No. 799, Pub. L. No. 93-253, *amending* 28 U.S.C. § 2680(h) (1970) of the Federal Tort Claims Act (July 10, 1974). Similarly, the standard practice of the United States in settling tort claims against it is to require dismissal with prejudice of any related action by the claimant against the officials involved and release of any rights against them. *See* FEDERAL LITIGATION, *supra* note 43, at 233.

105. *See, e.g.*, 26 U.S.C. § 7423 (1970) (liability for wrongful collection of internal revenue taxes). *See also* 10 U.S.C.A. § 1089(b) (West Supp. 1977); 22 U.S.C.A. § 817(b) (West Supp. 1977); 28 U.S.C. § 2679(c) (1970); 38 U.S.C.A. § 4116(b) (West Supp. 1977); 42 U.S.C. § 233(b) (1970); 42 U.S.C.A. § 2458(b) (West Supp. 1977).

106. *See* Dep't of Justice Order No. 683-77, Statement of Policy—Limitation for Representation of Federal Employees, 42 Fed. Reg. 5695, 5696 (1977) (to be codified at 28 C.F.R. § 50.15) [hereinafter cited as Justice Department Representation Policy], which also makes the decision to represent a federal official depend on whether doing so is "in the interest of the United States." *See also House Supplemental Appropriations Hearings, supra* note 31, at 546, 556, 568 (statement of Irving Jaffe). The legal basis cited for the practice is a federal statute reserving to the Department authority over "the conduct of litigation in which the United States, an agency, or official thereof is a party, or is interested. . . ." 28 U.S.C. § 516 (1970). *See also id.* §§ 516, 518; *House Supplemental Appropriations Hearings, supra* note 31, at 546.

The Department has invoked, as the basis of its authority to engage private counsel, both the Attorney General's general contracting power, 41 U.S.C.A. § 11(a) (West Supp. 1977), and his inherent executive authority, *see* United States v. Macdaniel, 32 U.S. (7 Pet.) 1, 13-14 (1833). Memorandum from John M. Harmon to Irving Jaffe (Feb. 16, 1977), *reprinted in Senate Supplemental Appropriations Hearings, supra* note 103, at 848-49.

107. *See* Justice Department Representation Policy, *supra* note 106, at 5696.

108. *See House Supplemental Appropriations Hearings, supra* note 31, at 546.

109. *See* Bell Address, *supra* note 103. The "valid governmental interest" consideration also precludes the Department from paying for the official's representation by private counsel. *See* Justice Department Representation Policy, *supra* note 106. On the other hand, the

is merely "the target of a criminal investigation," it still will not represent him, but it may in its discretion pay for the services of private counsel, thus assuring him a free, conflict-proof defense.[110] Further potential for conflict arises when a plaintiff in a civil suit growing out of governmental action sues two or more federal officials who have inconsistent defenses.[111] Because of the casual joinder of multiple defendants in governmental tort litigation today, this situation occurs with great regularity. The Department's usual response is to engage private counsel for each defendant.[112]

Underwriting the costs of a legal defense in these two kinds of situations has proved an expensive proposition. The Attorney General recently reported that, although the bar is generally willing to defend federal officials at reduced fees, the Justice Department spent more than a million dollars over the last two fiscal years for outside legal services.[113] When asked in 1977 to appropriate supplemental funds to meet this expense, Congress took a dim view of the expenditures[114] and eventually cut the request by nearly two-thirds.[115] More importantly, Congress indicated that some other solution to the problem would have to be found.[116]

On the state level, matters are less clear. Fifteen years ago, when the California Law Revision Commission investigated the sovereign immunity

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Department feels free to defend federal officials, and not simply to provide them with outside counsel, when possible violations of state criminal law are involved. *See House Supplemental Appropriations Hearings, supra* note 31, at 556.

110. *See* Justice Department Representation Policy, *supra* note 106; *House Supplemental Appropriations Hearings, supra* note 31, at 556, 559, 570. This presupposes, of course, a finding that the official acted within the scope of his employment and that providing him with outside counsel is in the interest of the United States. The Department will not consider it in the national interest even to provide outside counsel, when it is convinced that the official acted in bad faith or actually violated federal or state criminal law. *See id.* at 570.

111. *See House Supplemental Appropriations Hearings, supra* note 31, at 546; *Senate Supplemental Appropriations Hearings, supra* note 103, at 880; Bell Address, *supra* note 109; *See also* ABA CODE OF PROFESSIONAL RESPONSIBILITY, Canon 5, Ethical Considerations 5-14, 5-16 (1977). On the difficulty of grouping individual defendants in governmental tort cases according to their interests, *see House Supplemental Appropriations Hearings, supra* note 31, at 560, 562.

112. *See* Justice Department Representation Policy, *supra* note 106.

113. *See House Supplemental Appropriations Hearings, supra* note 31, at 559. Although the Department has traditionally retained private counsel to defend federal officials, until recently it has been able to absorb the cost through its normal operating budget. *See id.* at 561, 565; *Senate Supplemental Appropriations Hearings, supra* note 103, at 857, 859, 881.

Outside counsel is paid between $50 and $75 an hour, while government lawyers earn about $10 an hour. *See* Marro, *supra* note 31.

114. *See House Supplemental Appropriations Hearings, supra* note 31, at 560, 563-64, 571; *Senate Supplemental Appropriations Hearings, supra* note 103, at 856, 860-62. At the same time that it sought supplemental funds for private counsel fees, the Justice Department requested an additional $1,228,000 in connection with liability arising out of the national swine flu immunization program, pursuant to Pub. L. No. 94-380, 90 Stat. 1113 (1976), 42 U.S.C.A. § 247b(j)(k) (West Supp. 1977). *Id.* at 833.

115. Supplemental Appropriations Act of 1977, Pub. L. No. 95-26, 91 Stat. 61 (1977). *See* Bell Address, *supra* note 103. The Justice Department had sought $4,878,000. *See House Supplemental Appropriations Hearings, supra* note 31, at 546.

116. *See House Supplemental Appropriations Hearings, supra* note 31, at 564-66, 571; *Senate Supplemental Appropriations Hearings, supra* note 103, at 878, 881. *See also Justice Dep't Assailed on Using Private Lawyers*, N.Y. Times, Jan. 30, 1978, at 19, col. 2. The Justice Department's recognition that retaining private counsel for all federal employees whom it cannot represent offers no long term solution encouraged it to introduce the proposed amendments to the Tort Claims Act. *See* notes 129-32 and accompanying text *infra*.

problem in preparation for what was to become the state's governmental tort claims legislation,[117] it found the practice of indemnification to be "haphazard and incomplete." [118] The little research that has been done elsewhere tends to support this conclusion.[119] As noted earlier,[120] however, a growing number of states have since authorized or required public entities, within limits, to indemnify public officials for judgments and legal costs incurred in connection with their work.

One disadvantage of the indemnification approach, even when expressly provided for by statute, is that it requires individual officials who are sued to take the initiative in obtaining their indemnity from the government. Dislike of litigation, fear of reprisals, or sheer inertia can easily deter officials from doing so. Ironically, those whose timidity indemnification is designed to overcome might be the ones most reluctant of all to demand it.

The indemnification approach has a second major drawback. Because tort victims still would have an action only against the individual official, their interest in compensation would remain subordinate to the latter's ability to pay.[121] Inherent in such a situation is the risk that plaintiffs may not obtain full relief. Even if the system were modified to make the government secondarily liable to tort victims for any unpaid balance on judgments against a public official, that protection might be unavailable in cases falling within the excluded category of egregious misconduct.[122] Yet, leaving the tort victim without compensation when he is most mistreated seems not only arbitrary, but perverse. At least where the official is acting broadly within the scope of his authority when he commits the tort in question, the government should guarantee relief.

B. *Government Based Liability*

1. *Exclusive Governmental Liability.* The case for a system of exclusive governmental liability is an attractive one. First, like the master-servant rule in private law, exclusive governmental liability recognizes the greater capacity of employers than of employees to provide compensation.[123] Besides having a deeper pocket, the government through taxation can more easily distribute such losses among all who benefit from its services. Second,

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117. CAL. GOV'T CODE §§ 810-996.6 (West Supp. 1977).

118. CALIFORNIA LAW REVISION COMM'N, *supra* note 29, at 814.

119. *See* Mathes & Jones, *supra* note 30, at 911-12.

120. *See* notes 95 & 97 and accompanying text *supra.*

121. *See* notes 91-93 and accompanying text *supra.*

122. *See, e.g.,* ILL. ANN. STAT. ch. 24, § 1-4-5 (Smith-Hurd 1962) (no governmental liability for "wilful misconduct"); IOWA CODE ANN. § 25A.2(5) (West Supp. 1977) (no governmental liability for "willful and wanton conduct"); N.J. STAT. ANN. § 59:2-10 (West Supp. 1977) (no governmental liability for "actual fraud, actual malice or willful misconduct"). *See also* Mills v. County of Winnebago, 104 Ill. App. 2d 366, 244 N.E.2d 65 (1969); Givens v. Sellars, 273 N.C. 44, 159 S.E.2d 530 (1968). It has recently been suggested that the government's liability, however limited, should at least cover injury due to intentional wrongdoing by its officers. *See* Note, *An Insurance Program to Effectuate Waiver of Sovereign Tort Immunity,* 26 U. FLA. L. REV. 89, 94-96 (1973), and cases cited therein.

123. *See* W. PROSSER, *supra* note 14, at 459; *Vicarious Liability, supra* note 98, at 515.

exclusive governmental liability may have advantages from a deterrence point of view. By encouraging higher standards of care in the selection, training, equipment, and supervision of personnel, such a system can have at least as positive an effect on governmental performance as one based upon liability of the individual official.[124] It would also protect the official from any paralyzing threat of direct personal liability, thus presumably improving morale and effectiveness.

Finally, the principle of exclusive governmental liability offers distinct advantages from the point of view of litigation. In its absence, plaintiffs tend to sue multiple defendants as a means of enhancing the likelihood of ultimate recovery. An immediate consequence of joining individual officials and the government as defendants is that the officials may need independent legal representation in order to enjoy a conflict-free defense. The cost of those services may pose a major financial hardship. Even if the government pays the bill, as is often the case,[125] the cost will consume precious tax dollars.[126] Furthermore, adding defendants increases the complexity of litigation in nearly every procedural respect. Compounding parties usually means compounding substantive issues as well. Although removing the individual official as defendant normally will not remove him as witness, it may lessen and even obviate the need to resolve issues such as good faith or reasonableness upon which personal immunity may depend. Sole governmental liability, in short, promises aggrieved persons adequate compensation for their losses while eliminating the temptation to inject unnecessary defendants and issues into the litigation.

Systems of exclusive governmental liability are not unknown. One example is the federal statute which creates an exclusive cause of action against the United States for the negligent operation of a motor vehicle by a federal employee within the scope of his employment.[127] Moreover, as a practical matter, exclusive governmental liability obtains whenever a statute obligates public entities to defend their officers and employees in civil damage actions and to pay any resulting judgments.[128]

Significantly, the Justice Department recently proposed to Congress a

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124. *See* Davis, *supra* note 3, at 217; Davis, *An Approach to Legal Control of the Police*, 52 TEX. L. REV. 703, 720 n.47 (1974); Fuller & Casner, *supra* note 101, at 460; James, *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 YALE L.J. 549, 569 (1948). *See also* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 422 n.5 (1971) (Burger, C.J., dissenting).

125. *See* notes 113-16 and accompanying text *supra*.

126. *See* David, *supra* note 1, at 4, 6; Gibbons, *Liability Insurance and the Tort Immunity of State and Local Government*, 1959 DUKE L.J. 588.

127. 28 U.S.C. § 2679(b) (1970). Other examples of exclusive governmental liability include 10 U.S.C.A. § 1089(a) (West Supp. 1977); 22 U.S.C.A. § 817(a) (West Supp. 1977); 38 U.S.C.A. § 4116(a) (West Supp. 1977); 42 U.S.C. § 233(a) (1970); 42 U.S.C.A. § 2458a(a) (West Supp. 1977) (liability for personal injury or death attributable to action of certain medical personnel of armed forces, Defense Department, Central Intelligence Agency, State Department, Veterans' Administration, Public Health Service, and National Aeronautics and Space Administration); 26 U.S.C. § 7426(d), (e) (1970) (liability for wrongful levy, for surplus proceeds or substituted sale proceeds); 28 U.S.C.A. § 1498(b) (West Supp. 1977) (liability for copyright infringement); 46 U.S.C. § 745 (1970) (suits in admiralty).

128. *See, e.g.*, CAL. GOV'T CODE §§ 815.2, 996.4 (West 1966). *See* notes 45-46, 95-97 *supra*.

bill that would amend the Federal Tort Claims Act to make the United States the sole defendant in civil damage suits arising out of federal governmental activity.[129] The bill extends the principle of exclusive liability not only to common law torts committed by federal officials within the scope of their duty, but also to constitutional wrongs, whether committed "within the scope of" or "under color of" office.[130] Even under the proposed legislation, however, the Act would contain numerous and important exceptions.[131] In order not to foreclose plaintiffs from recovering damages from individual officials in cases not covered by the statute, the bill limits the principle of exclusivity to situations in which the Federal Tort Claims Act permits recovery against the United States.[132]

The major objection to exclusive governmental liability is that it dis-

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129. S. 2117, 95th Cong., 1st Sess. (1977); H.R. 9219, 95th Cong., 1st Sess. (1977) [hereinafter cited as Justice Department Bill]. The Justice Department submitted the bill in an effort, not only to provide tort victims with a financially responsible defendant and lessen federal officials' fear of personal liability, but also to eliminate the Department's need to engage private counsel on behalf of officials who have been sued. *See* Letter from Attorney General Griffin B. Bell to Vice President Mondale (Sept. 16, 1977) [hereinafter cited as Bell Letter]; Bell Address, *supra* note 103; notes 109-116 and accompanying text *supra*.

For a description of an earlier effort by the Justice Department to make the federal government exclusively liable for service-related torts, see Boger, Gitenstein & Verkuil, *The Federal Tort Claims Act Intentional Torts Amendment: An Interpretative Analysis*, 54 U. N.C. L. REV. 497, 512, 514 (1976).

The exposure of state officials to personal liability under federal civil rights legislation, 42 U.S.C. § 1983 (1970), makes it difficult for state legislatures to accomplish as sweeping a reform as Congress is now considering. Since the courts have held that states, *see, e.g.*, Cheramie v. Tucker, 493 F.2d 586 (5th Cir.), *cert. denied*, 419 U.S. 868 (1974), municipalities, *see e.g.*, Monroe v. Pape, 365 U.S. 167 (1961), other state political subdivisions, *see, e.g.*, Moor v. County of Alameda, 411 U.S. 693, 706 (1973), and governmental instrumentalities, *see, e.g.*, Monell v. Department of Social Servs., 532 F.2d 259, 262-64 (2d Cir. 1976), *cert. granted*, 97 S. Ct. 807 (1977) (No. 75-1914); Garrett v. City of Hamtramck, 503 F.2d 1236, 1249 (6th Cir. 1974), are immune from liability under § 1983, substitution of governmental for officer liability in such cases would require statutory amendment. The Supreme Court only recently suggested that the eleventh amendment would not bar Congress from imposing § 1983 liability directly upon the states and their component agencies. Fitzpatrick v. Bitzer, 427 U.S. 445, 451-56 (1976). However, state legislatures may, consistent with the federal policy behind the Civil Rights Act, provide under certain circumstances for indemnification by the state of public officials held liable under § 1983. *See* note 98 *supra*.

130. Justice Department Bill, *supra* note 129, § 5. The "under color of" test is described as broader than the "within the scope of" test. Bell Letter, *supra* note 129. The bill provides that, upon certification of scope of employment or color of office by the Attorney General, a lawsuit filed against an individual federal official in state court will be removed to federal district court and the United States substituted as defendant. The suit would then proceed as if it had been initiated against the United States under the Federal Tort Claims Act. Justice Department Bill, *supra* note 129, § 6; Bell Letter, *supra* note 129.

By recognizing a broad statutory cause of action against the United States for the constitutional torts of its officials, the bill greatly expands the bases of federal liability. Sections 1 and 2 of the bill provide that causes of action based on constitutional tort theory would be governed by federal law. Nevertheless, state law would continue to apply to common law tort actions brought under the Federal Tort Claims Act. 28 U.S.C. § 1346(b) (1970). Damages would be governed by state law regardless of the theory upon which the court grants them. *See* Bell Letter, *supra* note 129. However, § 3 of the bill would guarantee the victim of a constitutional tort at least $1,000 in liquidated damages, as well as reasonable costs, including attorney's fees.

131. 28 U.S.C. § 2680 (1970). In particular, actions for libel, slander, misrepresentation, deceit, and interference with contract rights would continue to be excluded from the Federal Tort Claims Act. *Id.* § 2680(h). Justice Department Bill, *supra* note 129, § 8. The discretionary acts exception presumably also remains unaffected.

132. Justice Department Bill, *supra* note 129, § 3. *See* Bell Letter, *supra* note 129. Beyond those cases, common law principles of officer liability presumably would remain unimpaired.

regards the element of personal fault. Because there are good reasons for preserving the personal liability of public officials, at least where they have acted egregiously—for example in the case of intentional wrongdoing or gross negligence—this objection is important. First, the harm resulting from such conduct is probably more easily avoided than the harm caused by simple negligence and is therefore a poorer candidate for consideration as an ordinary cost of government. Second, if the threat of personal liability serves some deterrent purpose, its imposition would seem particularly useful where willful or wanton misconduct is concerned. Finally, even if such conduct cannot readily be eliminated, it does not follow that the public should have to pay for its consequences. On the contrary, retributive justice would seem to demand that public officials answer personally for egregious conduct.[133] Such considerations suggest the importance of not absolving public officials of responsibility for their irresponsible behavior. The Justice Department bill meets this need through a system of administrative discipline. It specifically requires the Attorney General to refer the matter to the head of the department or agency involved "for such further administrative investigation or disciplinary action as may be appropriate" [134] whenever an official's misconduct results in the payment of damages by the federal government.

A system of administrative discipline has obvious strengths. First, its broad assortment of penalties—censure, fine or suspension, to name a few—provides a flexibility often missing in awards of civil damages.[135] Thus, the sanction to be imposed on the offending official would be dictated not by the victim's entitlement to compensation, but by a variety of more directly relevant factors such as the official's past record of service, the risks inherent in his job, and the paralyzing effect, if any, of personal liability upon his and others' future performance. Of course, attention should also be given to the deterrent value of the sanction chosen. In addition, it might be desirable to require an official to reimburse the government for compensation and other costs incurred as a result of his egregious misconduct, or to deprive him of

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133. It has been questioned whether taxpayers should be asked to underwrite the cost of insurance to protect against liability arising out of intentional wrongdoing. Insurance policies frequently exclude protection against this kind of conduct. *See* McManis, *supra* note 3, at 850-51.

134. Justice Department Bill, *supra* note 129, § 7. Although the bill does not expressly so provide, the Supreme Court's construction of the Federal Tort Claims Act in United States v. Gilman, 347 U.S. 507 (1954), would rule out any governmental right of recovery against the individual official. *See also* note 158 *infra*. Judge Wilkey has suggested, as an alternative to civil liability, "oversight—by the press, by Congress, by the public, and by internal agency personnel." Expeditions Unltd. Aquatic Enterprises, Inc. v. Smithsonian Inst., 566 F.2d 289, 305 (D.C. Cir. 1977) (en banc) (concurring opinion). In many cases, criminal sanctions would also be available.

135. *See* R. VAUGHN, THE SPOILED SYSTEM 154, 162 (1975); Vaughn, *supra* note 3, at 116-19. Federal law authorizes disciplinary action against federal employees "for such cause as will promote the efficiency of the service." 5 U.S.C. § 7501(a) (1976); 5 C.F.R. § 752.104(a) (1977). Such cause includes "(1) [d]elinquency or misconduct in prior employment; (2) [c]riminal, dishonest, infamous or notoriously disgraceful conduct, . . . [and] (8) any statutory disqualification which makes the individual unfit for the service." *Id.* §§ 731.202, 752.104(a) (1977). Sanctions available at the federal level include removal, suspension, leave without pay, and reduction in rank or pay. 5 U.S.C. § 7511 (1970); 5 C.F.R. § 752.101 (1977).

any sum by which he may have been unjustly enriched. Given the fact that official misconduct can take any number of forms, from motor vehicle violations to defamation, flexibility in the disciplinary process is highly useful.

Second, a system of administrative discipline in and of itself would be an effective deterrent. Recent scholarship suggests that public officials respond at least as favorably to the threat of direct and immediate service-related sanctions as they do to the threat of civil litigation and eventual liability in damages.[136] In any case, the fact that the offending official may not be a party to the litigation or run the risk of personal liability does not necessarily mean that the litigation and liability would serve no deterrent purpose. Indeed, focusing civil liability on the government may actually have an advantage in this respect.[137]

Third, isolating for separate treatment the issues related to deterrence and retribution would simplify the conduct of tort litigation, thus permitting courts to concentrate on the victim's entitlement to compensation. At the same time, disciplinary responsibility would be left in the hands of the relevant department or agency head, who is presumably more familiar than a judge with the difficulties that a particular official faces in his work. Finally, a system of administrative discipline, unlike private litigation, would not make the imposition of sanctions for misconduct depend upon whether the victim chooses to institute legal action.

The effectiveness of this approach depends, of course, upon the unarticulated premise in the Justice Department's bill that a system of disciplinary sanctions would be taken seriously. While evidence suggests that until now such systems have not functioned adequately,[138] efforts toward reform appear to be underway.[139] Since the Justice Department proposal would assign to the disciplinary mechanism virtually the entire deterrent and retributive function, the importance of its reliability can scarcely be exaggerated. In the final analysis, no system based upon exclusive governmental liability should be adopted simply because it offers an expedient way of compensating the victims of government-inflicted harm. Society has at least as much interest in preventing misconduct as in compensating those injured

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136. *See* Davis, *supra* note 3, at 216-17; Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493, 514-15 (1955); James, *supra* note 124, at 559-63; James & Dickinson, *Accident Proneness and Accident Law*, 63 HARV. L. REV. 769, 779-82 (1950).

137. *See* note 124 and accompanying text *supra*.

138. *See* Foote, *supra* note 136, at 494-95; Vaughn, *supra* note 3, at 107. *See also* Buder, *Thirty New York Policemen Fail Corruption-Complaint Tests*, N.Y. Times, Oct. 25, 1977, at 1, col. 3.

139. President Carter has recently called for legislative action to reward merit and penalize incompetence on the part of federal executive officials. In addition to recommending that the Civil Service Commission's responsibilities for enforcing standards of service and for protecting employee rights be assigned to new separate agencies—an Office of Personnel Management and a Merit Systems Protection Board, respectively—he has urged an end to automatic status and pay increases for managers and supervisors, and speedier dismissal of incompetent employees. N.Y. Times, Mar. 3, 1978, at 1, col. 1. Bills to this effect have been introduced in both houses of Congress. S. 2640, 95th Cong., 2d Sess. (1978); H.R. 11280, 95th Cong., 2d Sess. (1978).

Professor Vaughn advocates, among other things, a mechanism by which aggrieved citizens may invoke disciplinary procedures against delinquent officials. R. VAUGHN, *supra* note 135, at

by such misconduct. Society also has a right to insist that when public officials conduct themselves egregiously, they do so at their own risk.

2. *Governmental Liability with Indemnification.* A system of governmental liability with indemnification would preserve the compensatory advantages of exclusive governmental liability. To achieve the desired deterrent and retributive effects in cases of egregious misconduct, however, it would rely not upon administrative discipline but upon a judicially enforced right of recovery. In light of the Supreme Court's refusal to infer a governmental right of recovery under the Federal Tort Claims Act,[140] legislatures seeking to establish such a right may have to do so expressly. On the other hand, since subrogating the government to service-related claims against its officials is fully consistent with common law principles,[141] any intent to exclude or limit a right of recovery likewise should be made explicit.[142]

It is important to note that statutes establishing a system of governmental liability with indemnification rarely[143] make the plaintiff's cause of action against the government exclusive.[144] Because they permit the joinder of the individual official as defendant, such statutes leave the door open to complicated litigation that is vexatious to public officials. An express exclusivity provision would eliminate this problem.

Assuming the plaintiff is permitted to sue only the government, the key issue remains whether the governmental right of recovery only introduces similar problems of complicated, vexatious litigation at a later stage. It probably does not. In the first place, if the government prevails in the main action, it will have no right of recovery. Assuming that the government loses, it would seek indemnification only if it were convinced that the official acted

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154-66. *See also* Center for Governmental Responsibility, Civil Sanctions: A Proposal for Promoting the Personal Accountability of Public Employees 1-7, 25, 29, 36-37 (Feb. 1977) (unpublished report).

140. In United States v. Gilman, 347 U.S. 507 (1954), the Court found no satisfactory guidance in either the text or the legislative history of the statute. After weighing the relative merits of allowing or denying the government a right of recovery, it decided to leave the matter "for those who write the laws, rather than for those who interpret them." *Id.* at 513. In fact, the legislative history contains support for the view that Congress meant to deny any such right. *See Bills to Provide for the Adjustment of Certain Tort Claims Against the United States, Hearings on H.R. 5373 and H.R. 6463 Before the House Judiciary Comm.*, 77th Cong., 2d Sess. 9-10 (1942) (statement of Assistant Attorney General Francis M. Shea); S. Rep. No. 1196, 77th Cong., 2d Sess. 5 (1942). Viewed in this light, the Court's decision may have been an invitation for Congress to reevaluate the question of subrogation of the government to private claims against its officials. *But see* Vaughn, *supra* note 3, at 105-06.

141. The common law permits an employer to recover from an employee amounts paid to compensate persons whom the employee injures while acting within the scope of his employment. *See* W. PROSSER, *supra* note 14, at 311-13; RESTATEMENT (SECOND) OF AGENCY §§ 343, 401 (1958). *See also* Tyree v. City of Los Angeles, 92 Cal. App. 2d 182, 206 P.2d 912 (1949). Warren Seavey, reporter for the Restatement, suggested that "indemnity should be granted under the ordinary rules of restitution because the employee caused a loss which in equity and good conscience should be paid by him." Seavey, *"Liberal Construction" and the Tort Liability of the Federal Government*, 67 HARV. L. REV. 995, 1002 (1954).

142. *See, e.g.*, CAL. GOV'T CODE §§ 825.4, 996 (West 1966).

143. *See, e.g.*, TENN. CODE ANN. § 23-3322 (1976) (no remedy against employee for damages for which governmental entity is liable under Governmental Tort Liability Act unless damages sought exceed certain limits).

144. *See* notes 88-89 *supra.*

egregiously. Even then, the government might conclude that the detrimental effect of the threat of personal liability on the official and his colleagues outweighs the need for indemnification and deterrence. Thus, allowing the government to determine initially issues such as an official's good faith or an official's need for freedom from fear of liability might, as in the exclusive liability model, release the courts from having to consider such questions in the vast majority of cases. In any event, giving the government rather than the injured party the discretion to sue the official would make the official's exposure to litigation and liability less arbitrary than it is today.[145]

Cases will arise, however, in which the government seeks to enforce a claim to which it is subrogated, and some mechanism for handling such cases must therefore be devised. This raises delicate procedural problems. The interest in removing issues peculiar to an official's immunity defense from the main action militates in favor of barring the government from suit until that action has terminated. However, since the official would then appear in the first proceeding as at most a witness, he would not be bound by the court's findings. This would invite a subsequent relitigation of issues, thus imposing an added burden on judicial and personal resources.

On the other hand, permitting the government routinely to file third-party complaints against individual officials upon the commencement of the main action would thwart the very purpose of confining the plaintiff to a suit against the government. It would complicate, often needlessly, the conduct of the main action. More importantly, by hastening the direct involvement of individual officials in tort actions brought against the government, it might intensify their fear of personal litigation and liability. On balance, it seems desirable to require the government if possible to assert its right of recovery against its officials in the course of the main action, but not necessarily at the outset. In fact, the government might be barred from asserting it at all, unless and until the evidence suggests a *prima facie* case of egregious misconduct.

There is probably little reason to fear the precipitous or indiscriminate filing of third-party complaints. A more serious concern is whether the government would exercise its rights of recovery at all. Studies on the exercise of similar rights in the private sector suggest that some skepticism on this score may be warranted; apparently private employers rarely pursue subrogated claims against their employees.[146] The little information that

145. *See* Expeditions Unltd. Aquatic Enterprises, Inc. v. Smithsonian Inst., 566 F.2d 289, 307 (D.C. Cir. 1977) (en banc) (Wilkey, J., concurring). *Cf.* Cramton, *Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant*, 68 MICH. L. REV. 387, 465 (1970) (in the context of suits challenging validity of administrative action, government should have responsibility for adding individuals or agencies as defendants).

146. *See* James, *supra* note 124, at 556-57; James, *supra* note 3, at 638; Leflar & Kantrowitz, *Tort Liability of the States*, 29 N.Y.U. L. REV. 1363, 1414 (1954); Note, *Government Recovery of Indemnity from Negligent Employees: A New Federal Policy*, 63 YALE L.J. 570 n.3 (1954). This may simply reflect the capacity of employers to absorb and pass on to the consumer the losses caused by employees, just as they pass on other costs of doing business. It may further reflect concern over the adverse effects of personal liability on employee morale and labor relations.

exists indicates that the government is also slow to invoke existing rights of indemnification.[147] Still, these data should not be regarded as decisive. The mere fact that an available means of preventing and punishing official misconduct is underutilized is a poor reason for discarding or rejecting it. Indeed, the situation calls for developing means by which the government may be encouraged, and under certain circumstances compelled, to exercise its limited rights of recovery. Without such means, the deterrent and retributive purpose of the system would be undermined.[148]

A further problem raised by the partial indemnification model is defining the category of egregious conduct to which the government's right of recovery should extend. It is generally assumed that a standard such as "fraud, corruption or . . . malice" [149] should apply. Such a standard has certain advantages. It accords with the widely held belief that deliberately wrongful behavior merits harsh treatment on both retributive and deterrent grounds.[150] Moreover, requiring the government to show fraud, corruption or malice in order to recover limits the exposure of public officials to litigation and liability. Officials who actually exercise good faith in the performance of their duties should have relatively little to fear.[151]

While it may not be difficult to rally support for the principle that public officials should pay personally for their fraud, corruption or malice,[152] the fact remains that conduct which is neither fraudulent, corrupt nor malicious still may be highly improper and injurious.[153] Yet, as both federal constitutional tort[154] and civil rights[155] cases suggest, conditioning the govern-

147. *See* David, *supra* note 1, at 36; Davis, *supra* note 3, at 208-09. Prior to United States v. Gilman, 347 U.S. 507 (1954), *see* note 140 and accompanying text *supra*, the federal government sought and recovered damages against its employees in a number of cases. *See, e.g.*, Burks v. United States, 116 F. Supp. 337 (S.D. Tex. 1953).

148. A principal argument of those who have advocated abrogation of the sovereign immunity doctrine is that giving the government a right of indemnity against its employees would preserve their incentive to act with due care. *See* Fuller & Casner, *supra* note 140, at 450, 459.

149. Many states have adopted such a formula. *See, e.g.*, IDAHO CODE § 6-903(d) (1977) ("malice or criminal intent"). *See also* notes 87-89, 122 *supra*.

The formula's emphasis on bad faith may reflect the fact that many formative cases on officer liability arose in the area of defamation in which considerations of motive have traditionally been important. *See, e.g.*, Howard v. Lyons, 360 U.S. 593 (1959); Barr v. Matteo, 360 U.S. 564 (1959); Glass v. Ickes, 117 F.2d 273 (D.C. Cir. 1940), *cert. denied*, 311 U.S. 718 (1941). *See also* Spalding v. Vilas, 161 U.S. 483 (1896). *See generally* Handler & Klein, *The Defense of Privilege in Defamation Suits Against Government Executive Officials*, 74 HARV. L. REV. 44, 65-68 (1960); Jennings, *supra* note 3, at 308-09.

150. *See* James, *supra* note 3, at 647.

151. *See* Jaffe, *supra* note 3, at 231.

152. *See* 2 F. HARPER & F. JAMES, *supra* note 5, at 1645; Gray, *supra* note 3, at 310, 333.

153. *See, e.g.*, Norton v. Turner, 427 F. Supp. 138, 150 (E.D. Va. 1977).

154. *See, e.g.*, Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 456 F.2d 1339, 1341, 1346 (2d Cir. 1972) (federal agents violating fourth amendment immunized from personal liability only for action taken "in good faith and with a reasonable belief in [its] validity").

155. *See, e.g.*, Wood v. Strickland, 420 U.S. 308, 318 (1975) (student suing school board members in § 1983 action) (citing Scheuer v. Rhodes, 416 U.S. 232, 247-48 (1974): "It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct."). Toward the end of the *Wood* opinion, the majority seemed to merge the objective and subjective tests, requiring

ment's right of recovery against its officials upon a showing of bad faith would make it impossible to impose personal liability in such situations. Recognition of this fact may account for the current tendency of state legislatures to define egregious misconduct in objective as well as subjective terms.[156]

C. *Alternative Models Compared*

An acceptable system of liability for government-inflicted harm should adequately serve tort law's compensatory, deterrent, and retributive purposes without unduly inhibiting official initiative. As we have seen, officer based liability may fail to fully compensate the victim. Moreover, under those models an official's accentuated exposure to litigation and liability may be unjust and counterproductive. Government based liability, on the other hand, provides a more promising alternative.

The fundamental advantage of government based liability is that it permits separation of the various interests served by tort liability in the governmental context. Making the government initially liable in damage actions brought by governmental tort victims would tend to simplify litigation and enable courts to focus on the victim's entitlement to compensation, without continuous concern over the exposure of public officials to undue anxiety. Questions of deterrence and retribution, at present crudely resolved through direct officer liability, would be left in the first instance to the government. Redress against the offending official, should the government deem it appropriate, might be provided through a disciplinary mechanism or a limited right of recovery in the courts. However, to constitute an effective deterrent against serious misconduct, the prospect of personal accountability must be real. For this reason, whichever system is adopted, safeguards should be provided to enhance the likelihood of its actual use. For example, the decision to invoke the disciplinary process or the government's right of recovery might be made mandatory in certain cases, or at least vested in a governmental unit other than that served by the offending officer.[157]

As compared to the right of recovery in the courts, administrative discipline has several important advantages. Besides offering flexibility of sanctions, it would lessen the involvement of the courts in internal disciplin-

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plaintiffs to establish that the defendants acted with "such an impermissible motivation or with such disregard of the student's clearly established constitutional rights that [their] action cannot reasonably be characterized as being in good faith." 420 U.S. at 322. *Accord*, Procunier v. Navarette, 98 S. Ct. 855 (1978).

156. *See, e.g.*, UTAH CODE ANN. § 63-48-5(2) (1977) ("gross negligence, fraud, or malice"). *See also* notes 45, 87-89, 95-97 *supra*.

157. Under the 1974 Amendments to the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(F) (1976), the Civil Service Commission is required to initiate proceedings to determine whether disciplinary action is warranted in every case in which a court ordering production of agency records finds that "the circumstances surrounding the withholding [of those records] raise questions whether agency personnel acted arbitrarily or capriciously." The agency concerned must take the corrective action that the Commission recommends. *See also* note 139 *supra*.

ary matters, though of course leaving open the possibility of limited judicial review over the imposition of sanctions. As a practical matter, too, the government may be less reluctant to seek redress against public officials if it does not have to go into court, at least in the first instance, to do so.

In view of the apparent advantages of the disciplinary mechanism as a means of redress, it may be tempting for simplicity's sake to make it the government's sole recourse against the offending official. The proposed amendments to the Federal Tort Claims Act adopt this course.[158] However, the situation may arise in which the government is persuaded at an early stage that the official acted egregiously and that imposing a measure of personal liability would be appropriate. Foreclosing the government in such a case from bringing the official into the pending tort litigation as a third party defendant would bar the orderly and complete resolution of the controversy and only invite the relitigation of common issues within the disciplinary process, and perhaps in court, at a later date.

In the short run at least, it would seem preferable not only to leave the appropriate governmental authority discretion in deciding whether to proceed against the individual official, but also to leave it the option of proceeding by way of disciplinary action or right of recovery. Actual experience, coupled with research, should provide valuable insight into the relative practical advantages of these alternatives and, more importantly, into ways in which they can be made more effective.

IV. The Integration of Governmental and Officer Tort Liability in French and German Law

Recent developments in governmental tort law in France and Germany lend support for reform of the kind this Article has suggested. At the same time, however, they point to the need for close attention to the form of recourse against the individual official. Because the problem of

158. The Justice Department gave four reasons for not providing for third party actions: first, public officials normally can satisfy only modest money judgments; second, egregious misconduct rarely occurs; third, the threat of personal involvement in tort litigation would impair employee morale; and finally, the third party action would complicate litigation and necessitate retention of private counsel at government expense. Bell Letter, *supra* note 129. None of these reasons is persuasive. First, though a public official may be unable to satisfy the full amount of the government's tort liability, he may be able to satisfy that portion for which the government decides to seek recovery. Significantly, under government-based liability, an official's inability to satisfy the judgment rendered against him in a third party action would not jeopardize full compensation of the tort victim, since the government remains primarily liable. Second, the fact that the Justice Department anticipates little occasion for the government to exercise a right of recovery is a poor reason for denying such a right in cases where its use would be appropriate. Moreover, the probable infrequency of its use only weakens the Department's remaining arguments. The availability of a weapon so seldom—and hopefully discreetly—used is unlikely to undermine officer morale very seriously. Similarly, if the government rarely makes its officials third party defendants, the complication of litigation and cost of outside counsel should be relatively modest. In any case, if the government finds underwriting the cost of private counsel too onerous, it might reconsider the practice, especially in view of the fact that under the governmental liability with indemnification model no public official would be brought into the tort litigation until the government satisfies itself that he acted egregiously.

integrating the government's tort liability with that of its officials raises policy concerns which are more or less universal in character, the French and German experience in this regard is worth considering.

A. *French Law*

Even after the Revolution, the notion that the sovereign could do no wrong continued to immunize the French state from tort liability.[159] Furthermore, individual officials could be sued only with the consent of the Conseil d'Etat. Such consent was given only when the official had acted well beyond the scope of his authority.[160] These coexisting immunities reflected the strong republican suspicion of interference by the courts in governmental operations.

In the 1870's, the Third French Republic instituted sweeping changes in the area of governmental torts. It abolished the privilege enjoyed by public officials and subjected them to suit in the civil courts under the Civil Code as if they were private parties.[161] It also recognized the Conseil d'Etat as an administrative court and created a special body, the Tribunal des Conflits, to draw jurisdictional lines between the civil and administrative courts.[162] In the early *Blanco* decision,[163] the Tribunal indicated that the government could be sued in the administrative courts for the torts committed by its officers, and that those courts were at liberty to develop their own substantive principles of law. It noted that governmental liability "cannot be governed by the principles set out in the Civil Code for relations between private individuals . . . [I]t is neither general nor absolute, [but] . . . has its own special rules which depend upon the needs of the service and the necessity to reconcile the rights of the state with private rights. . . ."[164]

In the century since *Blanco,* the French courts have continued to distinguish between damage suits against the government and those against individual officials. In another early decision, the Tribunal des Conflits drew a fundamental distinction between *faute de service* (service-related fault), for which the government alone could be sued in the administrative courts, and *faute personnelle* (personal fault), for which suit could be

159. CONST. art. 75 (1799).

160. *Id. See* L. BROWN & J. GARNER, FRENCH ADMINISTRATIVE LAW 100 (2d ed. 1973).

161. Decree of Sept. 19, 1870, [1870] D.P. IV 91; [1870] Duv. Lois 335. Articles 1382 through 1384 of the Civil Code establish individual liability for harm done to others through fault, and make principals liable for the torts of their agents. The difference in treatment between suits brought against the government and those brought against public officials rested upon a reinterpretation of the separation of powers; while that doctrine barred the civil courts from passing judgment on governmental action, it did not prevent them from holding individual officials, like anyone else, personally liable for their actions.

162. Law of May 24, 1872, arts. 9, 25-28, [1872] J.O. 3483; [1872] D.P. IV 99, 101. The Conseil d'Etat was originally established as an advisory body on legal and administrative affairs empowered to "resolve difficulties that might arise in the course of administration." CONST. art. 52 (1799).

163. [1873] Lebon (supp. I) 61 (Trib. con.).

164. *Id.* at 70. One irony of the decision is that, while the Tribunal des Conflits in *Blanco*

brought only against the official in the civil courts.[165] As suggested by *Blanco,* these two kinds of actions might be decided according to different legal principles. Ultimately, the distinction between personal and service-related fault reflected the fear of intrusion by the civil courts in shaping public policy. Thus, the label *faute personnelle* denoted wrongs thought to be so divorced from the *service public* that by definition the availability of redress through those courts would not interfere with governmental action.[166] Today, the courts limit *faute personnelle* to action showing gross negligence, pure self-interest, or something akin to malice.[167]

The notion of *faute de service,* on the other hand, has expanded in several important respects. First, the fact that an employee acted wantonly or even with malice does not foreclose a finding of *faute de service,* provided the government also had functioned improperly.[168] The coexistence of both types of fault is known as *cumul.* Second, the courts now sometimes treat fault as service-related for the simple reason that the government provided the means or the occasion for a public official to commit the wrong.[169] Thus, the government will escape liability for the torts of its employees only when, to borrow the words of a leading decision, "the wrong is without

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probably meant to free the administrative courts from having to apply to the government such civil law principles as respondeat superior, those courts actually have used that freedom to impose on the government a broader scope of liability than otherwise would have been the case. L. BROWN & J. GARNER, *supra* note 160, at 104-109.

165. Pelletier [1873] Lebon (supp. I) 118. *See generally* G. VEDEL, DROIT ADMINISTRATIF 332 (5th ed. 1973). An important exception was created by a 1957 statute giving the civil courts exclusive jurisdiction over damage actions arising out of motor vehicle accidents, including those involving government vehicles. Law of Dec. 31, 1957, [1958] J.O. 196, [1958] D.L. 30.

166. According to an early and still-cited definition, service-related fault is "impersonal, revealing the official only as one who is more or less subject to error," while personal fault "reveals a man with his weakness, his passions, his imprudence." Conclusions of *commissaire du gouvernement* Laferrière in Laumonnier-Carriol, [1877] Lebon 437 (Trib. con.). For a description of the function of the *commissaire du gouvernement* in the administrative courts and Tribunal des Conflits, *see* L. BROWN & J. GARNER, *supra* note 160, at 50.

167. J. RIVERO, DROIT ADMINISTRATIF 286-87 (7th ed. 1975); B. SCHWARTZ, FRENCH ADMINISTRATIVE LAW AND THE COMMON LAW WORLD 259-61, 276 (1954); G. VEDEL, *supra* note 165, at 334, 352-53, 358.

168. In the well-known *Anguet* case, [1911] Lebon 146, postal employees had beaten the plaintiff severely for using the service exit of the post office rather than the public exit which had been closed ahead of schedule. The Conseil d'Etat awarded damages against the government on the ground that plaintiff's injuries "were attributable to the malfunctioning of a public service"—the premature closing of the post office doors. *Id.* In the course of reaching its decision, the Conseil expressly recognized the possibility of *cumul,* or combination, of faults, for it held the government answerable in damages to the plaintiff for "whatever personal liability might have been incurred by the individual officials." *Id.* In a subsequent case, the Conseil d'Etat awarded damages against a municipality for *faute de service,* even after the civil courts had held the mayor personally liable for the very same injury. Lemonnier, [1918] Lebon 761, *discussed in* M. LONG, P. WEIL, & G. BRAIBANT, LES GRANDS ARRETS DE LA JURISPRUDENCE ADMINISTRATIVE 149 (6th ed. 1974).

169. A. DE LAUBADÈRE, TRAITÉ DE DROIT ADMINISTRATIF 693 (7th ed. 1976). In the *Lemonnier* case, *supra* note 168, *commissaire du gouvernement* Léon Blum stated, "If personal fault has occurred in the public service, or on the occasion of the service, or if the means and instruments that made it possible were provided by the service . . ., then the administrative courts will and must say that, while the fault may be severable from the service (which is for the ordinary courts to decide), the service is not severable from the fault." Conclusions in Lemonnier, [1918] Lebon 761, *quoted in* M. LONG, P. WEIL, & G. BRAIBANT, *supra* note 168, at 149.

any link whatsoever with the public service."[170] Finally, litigants can establish *faute de service,* and recover from the government, without tracing their injury to an identifiable act of an identifiable public official. The mere fact that the machinery of government failed to operate as it should may suffice.[171]

The broad opportunities for securing compensation from the government in the administrative courts tend to discourage litigants from pursuing their remedy against the individual official in the civil courts. Other considerations reinforce this tendency. First, the Conseil d'Etat and *tribunaux administratifs* set rather high standards of care; they also apply strict liability in a greater number of situations than the civil courts.[172] More importantly, litigants in France, as in the United States, generally have a better chance of collecting judgments rendered against the government than against officials who may be wholly or partially judgment-proof. Added to this, the broad definition of *faute de service* has made choice of the government as defendant virtually irresistible.

In this type of bifurcated court system, suing the government normally means not suing the individual official since legal action against the official must be brought through an independent suit in a different forum. Thus, in France a litigant who stands a reasonably good chance of obtaining relief from the government is not likely to sue the official simply for good measure. This development has had the effect of ensuring adequate compensation of tort victims while protecting officials from vexatious litigation.[173]

As long as *faute de service* and *faute personnelle* were considered mutually exclusive,[174] the problem of allocating liability between the government and its officials did not arise. Once a litigant recovered damages from the government for service-related fault, the government could not seek indemnification from its official on the basis of personal fault.[175] But the *de facto* immunity of public officials which resulted eliminated an important disincentive to irresponsible behavior.[176]

With the recognition of *cumul* and the expansion of *faute de service,* the Conseil d'Etat had occasion to reconsider the allocation problem. In a pair of 1951 decisions,[177] it held that whether the plaintiff chooses to sue the

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170. Bernard, [1954] Lebon 505; Mimeur, [1949] Lebon 492. *But see* Dame Veuve Litzler, [1954] Lebon 376.

171. B. SCHWARTZ, *supra* note 167, at 276-83; Jacoby, *Federal Tort Claims Act and French Law of Governmental Liability: A Comparative Study,* 7 VAND. L. REV. 246 (1954). Still, the courts decline to award damages in tort against the government with respect to its discretionary activities, *e.g.,* Leca, [1942] Lebon 160.

172. L. BROWN & J. GARNER, *supra* note 160, at 104-09.

173. M. LONG, P. WEIL, & G. BRAIBANT, *supra* note 168, at 8.

174. A. DE LAUBADÈRE, *supra* note 169, at 691; J. RIVERO, *supra* note 167, at 258.

175. Poursines, [1924] D.P. III 49, *discussed in* M. LONG, P. WEIL, & G. BRAIBANT, *supra* note 168, at 374.

176. J. RIVERO, *supra* note 167, at 290; G. VEDEL, *supra* note 165, at 335, Waline, *De l'Irresponsabilité des Fonctionnaires pour leurs Fautes Personnelles, et des Moyens d'y Remédier,* 64 REVUE DU DROIT PUBLIC 5 (1948).

177. Laruelle, [1951] Lebon 464; Delville, [1951] Lebon 464.

government or an official, the defendant is entitled to recover an appropriate sum from the non-party. Where litigation is initiated in the administrative courts, as is usually the case, the government now may bring such an *action récursoire* against its officials in the same courts.[178] On the other hand, if the plaintiff chooses to sue an official for *faute personnelle* in the civil courts, and prevails, the official will have to pursue his right of recovery against the government in the administrative courts.[179] Thus, the administrative rather than the civil courts will always ultimately allocate liability.[180]

The Conseil d'Etat has given the administrative courts considerable latitude in apportioning liability. As a point of departure, the administrative courts will determine how great a part, if any, the *faute personnelle* of the individual official played in causing the particular injury. Where the government is guilty of no wrong other than that committed by one of its officials and its *faute de service* is fully vicarious, it is entitled to full indemnification.[181] In this situation, the government is in effect an insurer with full subrogation rights. However, apportionment of liability is seldom a simple mathematical function of causality.[182] The administrative courts appear to take a variety of policy considerations into account in allocating ultimate liability, including the degree of authority of the officials involved[183] and the need to deter their respective misconduct.[184] The fact that governmental

178. Laruelle, [1951] Lebon 464. Until that time, the Conseil d'Etat generally did not accord the government a right of recovery against its officials, largely on the ground that "the personal liability imposed on public officials might be so heavy as to risk paralyzing their sense of initiative." A. DE LAUBADÈRE, *supra* note 169, at 698.

179. Delville, [1951] Lebon 464. In this case, the Conseil d'Etat awarded the driver of a government truck an indemnity of one-half the damages for which he had been held liable. The driver had been drunk at the time of the accident, but the government had failed to maintain the brakes in good condition. Until that decision, the Conseil d'Etat denied government officials any right of recovery against the government. A. DE LAUBADÈRE, *supra* note 169, at 697.

180. Jeannier, [1957] Lebon 196. *See also* Moritz, [1954] Lebon 708 (Trib. con.). Scholars have pointed out the advantages of concentrating in the administrative courts the question of the government's liability to its tort victims, the ultimate allocation of liability between the government and its officials, and, where several officials are involved, the determination of their share of liability. M. LONG, P. WEIL, & G. BRAIBANT, *supra* note 168, at 378. However, since the official is not a party to the initial tort action against the government, that decision has no res judicata effect against him. He may reopen fully questions of both liability and damages. A. DE LAUBADÈRE, *supra* note 169, at 696.

181. In Jeannier, [1957] Lebon 196, the Conseil d'Etat held that the official "failed to show any *faute de service* which would eliminate or reduce his liability for the accident in question." *Id.* at 197. Thus, though the victim might have been able to recover damages directly from the government through an extended definition of *faute de service*, the official sued may not derive any benefit from that claim.

182. In Laruelle, [1951] Lebon 464, the Conseil d'Etat awarded a pedestrian damages against the government for injuries sustained when a soldier struck and injured him while driving an army vehicle on personal business without permission. In a subsequent proceeding it permitted the government to recover in full from the soldier, despite the fact that the army's inadequate supervision over the use of its vehicles—a service-related fault—had contributed to the accident. It justified doing so on the ground that this fault itself "had been provoked by [the soldier's] efforts to mislead the authorities in charge of the vehicle, and that under the circumstances, [he] will not be heard to invoke *faute de service* . . . in order to lessen his personal liability." [1951] Lebon at 465.

183. M. LONG, P. WEIL, & G. BRAIBANT, *supra* note 168, at 379.

184. *Id.* at 148, 378. However, since *faute personnelle* requires a good deal more than ordinary negligence on the part of the individual official in connection with his duties, *see* note 167 and accompanying text *supra*, the government cannot expect indemnification from its

tort litigation "has a strong disciplinary flavor"[185] may account for the apparent effort to keep the overall financial sanction imposed on any single public official in some proportion to the seriousness of his wrongdoing.[186] This evidently is done not only in the interest of justice, but also to avoid "a total paralysis of initiative in public service."[187] In fact, according to one authority,[188] the right of recovery is not widely used.

Thus, French administrative law has integrated governmental and officer liability in a unique way. From a formal point of view, it seems at least as committed as American law to the notion that a tort victim should have his choice of suing the government or one of its officials for injury arising out of governmental action. Indeed, depending upon the victim's preference, French law offers him separate courts and different rules of law. Practically speaking, however, French administrative law decidedly favors litigation against the government and has thus created a *de facto* system of virtually exclusive governmental liability in the first instance. Nevertheless, the administrative courts permit the government to seek full or partial indemnification from its officials. The ultimate allocation of liability entails a delicate balancing of considerations that seeks to give compensation to the victim, justice to the individual official, and effective government to society. On the whole, this approach does not differ sharply from the analysis a sensitive American court might make in a jurisdiction recognizing indemnification claims by the government against its officials.

B. *German Law*

When the *Bürgerliches Gesetzbuch* (BGB), or Civil Code, was adopted in 1898, the German state still enjoyed sovereign immunity from suit. Individual public officials, however, were personally liable under civil law principles for the torts they committed in connection with governmental activity. By definition these acts lay beyond the scope of their authority.[189] The BGB, which sought to unify civil law throughout the newly organized German Reich, does not alter these basic principles. Without mentioning governmental liability, section 839 specifically holds public officials liable

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officials without such a showing. On the other hand, it still may seek to impose upon them disciplinary sanctions—including pecuniary ones—for their simple negligence. G. VEDEL, *supra* note 165, at 363.

185. G. VEDEL, *supra* note 165, at 378.

186. The *commissaire du gouvernement* in Jeannier, [1957] Lebon 196, *see* note 181 *supra*, warned of the "special danger that liability may be imposed more readily the more subordinate the official." [1957] Lebon 196, 215.

187. M. LONG, P. WEIL, & G. BRAIBANT, *supra* note 168, at 380. Thus, for example, *faute lourde*, or particularly gross negligence, is required to establish officer liability arising out of police activities. Consorts Lecomte, [1949] Lebon 307.

188. J. RIVERO, *supra* note 167, at 291.

189. H. WOLFF & O. BACHOF, VERWALTUNGSRECHT I 555 (9th ed. 1974); Renck, *Zur Reform des Staatshaftungsrechts*, 9 ZEITSCHRIFT FUR RECHTSPOLITIK 221 (1977). The General State Code of Prussia, for example, provided that "[a] person holding public office must make all efforts to fulfill his responsibilities according to duty and is accountable for any injury arising in this regard which could have been prevented through the exercise of due care or the knowledge required to carry out the office." Allgemeines Landrecht für die Preussischen

in damages for injury resulting from their intentional or negligent breach of official duty.[190] The courts have interpreted the term "official duty" broadly to include duties arising not only out of specific statutes, regulations or administrative orders,[191] but also out of the general obligation to act with due care toward others.[192] Thus, a public official generally can be held liable in damages only upon some showing of personal fault.

Eventually, the same objections to officer liability voiced in France and the United States—the scale of liability to which public officials are exposed, the ill effects upon officer initiative, and the officials' inability to satisfy personal judgments—created pressure for a system based on governmental liability.[193] Following the example of several German states,[194] the Reich enacted a statute in 1910 making the government exclusively liable for the torts of federal officials.[195] Article 131 of the Weimar Constitution extended this principle to all levels of the government and gave it constitutional status.[196] As interpreted by the German courts, article 131 was fully coextensive with the officer liability of section 839 upon which it was based.[197]

Staaten, II, tit. 10, §§ 88-90 (1794). *See* Blachly & Oatman, *Approaches to Governmental Liability in Tort: A Comparative Survey*, 9 LAW & CONTEMP. PROB. 181, 199 (1942).

190. However, § 839 also provides that if the official is guilty of negligence alone, he may be held personally liable only if the injured party is able to secure compensation from no other source, such as a joint tortfeasor. H. WOLFF & O. BACHOF, *supra* note 189, at 563. Section 839 precludes recovery altogether if the injured party willfully or negligently fails to avert the injury through an available legal remedy.

By its terms, § 839 applies only to *Beamter*, or formally appointed civil servants. Technically, torts committed by other government employees are governed by the general tort provision, BGB § 823, which imposes personal liability for wrongful injury to another's life, body, health, freedom, property or for violation of other rights. This section also expressly establishes liability for the violation of a statute intended for protection of other persons. Section 826, another general provision of the BGB, imposes liability for the willful infliction of harm on another in a manner contrary to public policy. The separate treatment of *Beamter* was eliminated through subsequent constitutional developments. *See* note 198 *infra*.

The draftsmen of the BGB adopted a system based on officer rather than governmental liability largely out of concern for the financial status of the German states. H. VOGEL, DIE VERWIRKLICHUNG DER RECHTSSTAATSIDEE IM STAATSHAFTUNGSRECHT 14 (1977).

191. E. FORSTHOFF, VERWALTUNGSRECHT 323-25 (10th ed. 1973).

192. For a discussion of the interpretation of the standard of due care, see Braband, *Liability in Tort of the Government and its Employees: A Comparative Analysis with Emphasis on German Law*, 33 N.Y.U. L. REV. 18, 28-29 (1958).

193. E. FORSTHOFF, *supra* note 191, at 321. Forsthoff finds justification for such a system in the fact that the state "educates the official, examines him, places him on the job, has disciplinary authority over him, and is in charge of the public service." *See also* Weimar, *Zur Ausbildungsförderung: Die Haftung des Beamten und seines Dienstherrn*, 27 MONATSSCHRIFT FUR DEUTSCHES RECHT 645, 647 (1973).

194. *See generally* H. VOGEL, *supra* note 190, at 14-15 (1977). Particularly influential was the Prussian statute of Aug. 1, 1909, [1909] Preussisches Gesetzblatt 691.

195. Beamtenhaftungsgesetz, [1910] RGBl 798. However, as late as 1918, nine German states still refused to recognize governmental tort liability, direct or vicarious. H. VOGEL, *supra* note 190, at 16.

196. CONST. of 1919, art. 131. Shortly thereafter, the German Reichsgericht, or Supreme Court, ruled that article 131 was self-executing and applicable throughout the Reich. Judgment of Apr. 29, 1921, 102 RGZ 166, 168-71.

197. H. WOLFF & O. BACHOF, *supra* note 189, at 559, 565. If a public official caused an injury while acting beyond the scope of his authority, neither § 839 of the BGB nor article 131 would be applicable. Rather, the official remained personally liable under §§ 823 and 826 of the BGB. Rüfner, *Das Recht der öffentlichrechtlichen Schadensersatz- und Entschädigungsleistungen*, in ALLGEMEINES VERWALTUNGSRECHT 355, 358, 360-61 (H.-U. Erichsen & W. Martens ed. 1975). *See* note 190 *supra*.

When the draftsmen of the Bonn Constitution reenacted the substance of article 131, they ratified the generous construction that the courts of the Weimar Republic had given it. Thus, article 34 of the new constitution makes the government vicariously liable for the torts committed not only by public officials, but also by "any person in the exercise of the public office entrusted to him."[198] It also substitutes the term "public office" for "public power," implying that the government bears liability for injuries arising out of social services such as education or welfare, and not simply out of the exercise of the police power narrowly construed.[199] Notwithstanding the existence in Germany of separate administrative courts, article 34, like the Weimar Constitution before it, requires that all damage actions against the government based on section 839 be brought in the civil courts.[200]

Another feature carried forward into the new constitution is the government's discretionary right of recovery, or *Rückgriff*, against those officials for whose service-related torts it must answer.[201] This action, available only in the case of intentional or grossly negligent wrongdoing, seeks to preserve some of the deterrent and retributive effect of officer liability. The *Rückgriff*, too, must be brought in the civil courts.[202] But even as limited, the *Rückgriff* has been criticized as unfair and counterproductive, which may account for the fact that the federal and state governments in Germany seldom invoke it.[203]

Although governmental liability in Germany was originally strictly vicarious, the civil courts have recognized the need for compensation in many situations in which no showing of negligence or intentional wrongdoing on the part of a public official under section 839 can be made. The German courts have developed a complex array of theories by which to hold the government directly liable in damages, irrespective of individual fault. These theories afford relief when the government imposes excessive

198. GG art. 34. For decisions of the Reichsgericht to that effect, see Judgment of Apr. 4, 1941, 167 RGZ 1, 5; Judgment of July 2, 1926, 114 RGZ 197, 200-01. These decisions had the effect of treating as *Beamter* or civil servants, within the meaning of § 839 of the BGB, all employees and agents of the government. Provisions parallel to article 34 may be found in the constitutions of the individual German states. *E.g.*, VERF. BAYERN art. 97; VERF. HESSEN art. 136; VERF. RHEINLAND-PFALZ art. 132.

199. *See generally* E. FORSTHOFF, *supra* note 191, at 320-22. For prior case law to this effect, see Judgment of Nov. 23, 1937, 156 RGZ 220, 229-30; Judgment of June 8, 1928, 121 RGZ 254, 256.

200. *See* note 197 *supra.*

201. Article 131 of the Weimar Constitution provided only that "the right of recovery against the civil servant is reserved." The courts, however, limited the *Rückgriff* to cases of willful or grossly negligent wrongs. E. FORSTHOFF, *supra* note 191, at 320; Weimar, *supra* note 193.

202. GG art. 34. *See also* Bundesbeamtengesetz (BBG) § 78, [1971] BGBl 1181, 1193, and Beamtenrechtsrahmensgesetz (BRRG) § 46, [1971]. BGBl 1025, 1033, both of which provide that, in cases where the official acted only with gross negligence and not intentionally, the government enjoys a right of recovery only if it has no other source of indemnity.

203. Braband, *supra* note 192, at 31. *See also* STAATSHAFTUNGSRECHTSKOMMISSION, REFORM DES STAATSHAFTUNGSRECHTS 141 (Oct. 1973) [hereinafter cited as KOMMISSIONSBERICHT].

restraints on the use of private property[204] or otherwise severely sacrifices private interests for the common good.[205] More recently, the German administrative courts, which have jurisdiction to annul illegal governmental acts, also have begun to award monetary relief against the government, not as tort damages, but as a means of eliminating the effects of such action.[206]

Because these overlapping causes of action have developed independently of officer tort law, as well as of each other, governmental and officer liability in Germany has become highly confusing, both substantively and procedurally.[207] In 1970, a special commission was established to reexamine this body of law and attempt to simplify it. Its proposed bill of 1973 calls for amending the Coustitution to eliminate fault as the underlying basis of liability and to create a single independent cause of action against the government rather than against the individual official.[208] Such a suit, in most

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204. The civil courts have recognized two causes of action as elaborations upon the right of compensation for the taking of private property, or *Enteignung*, expressly provided for in the Constitution. GG art. 14. The *enteignende Eingriffsanspruch*, much like an inverse condemnation action, allows damages for the virtual taking of property through severe and unequal restraints on its free use. *See generally* E. FORSTHOFF, *supra* note 191, at 341-43; G. VON UNRUH, GRUNDKURS OFFENTLICHES RECHT 152 (1976). The *enteignungsgleiche Eingriffsanspruch* extends the right of compensation to invalid exercises of *Enteignung*, on the theory that if the government must compensate persons for taking their property legally, it should also compensate them when it does so illegally. *See generally* E. FORSTHOFF, *supra* note 191, at 353-57; H. WOLFF & O. BACHOF, *supra* note 189, at 528-29.

205. The *Aufopferungsanspruch*, or claim of special sacrifice, which is considered part of customary law, derives from old Prussian law. Einleitung zum Preussischen Allgemeinen Landrecht § 75 (1794), *discussed in* Rüfner, *supra* note 197, at 374. *See generally* H. WOLFF & O. BACHOF, *supra* note 204, at 527-28. It is also referred to in the code governing administrative court procedures. VwGO § 40(2). The courts recognize a distinct course of action, the *aufopferungsgleiche Eingriffsanspruch*, for cases in which the decision to require a special sacrifice is illegal. *See generally* Papier, *Zur Reform des Staatshaftungsrechts*, 89 DEUTSCHES VERWALTUNGSBLATT 577 (1974); Rüfner, *supra* note 197, at 358-59.

For still other forms of damage actions, see H. WOLFF & O. BACHOF, *supra* note 189, at 569, 572-74; Rüfner, *supra* note 197, at 399-410.

206. A party challenging the validity of administrative action frequently files not only an *Anfechtungsklage*, asking that it be set aside, but also a *Folgenbeseitigungsanspruch*, asking that its effects be eliminated as well. *See generally* Haueisen, *Zur Reform des Staatshaftungsrechts*, 27 DIE OFFENTLICHE VERWALTUNG 454, 457 (1974) [hereinafter cited as Haueisen]. The litigant is entitled to restoration of the status quo, but not to consequential damages. A. WITTERN, GRUNDRISS DES VERWALTUNGSRECHTS 51 (10th ed. 1975); Rüfner, *supra* note 197, at 406-07.

207. *See generally* Haueisen, *supra* note 206, at 455; Hesse, *Zur Reform des Staatshaftungsrechts*, 30 DER BETRIEBS-BERATER 13 (1975); KOMMISSIONSBERICHT, *supra* uote 203, at 34-35. According to Forsthoff, nearly every case involving property which comes within the scope of § 839 also gives rise to a potential *enteignende Eingriffsanspruch*, *see* note 204 *supra*. E. FORSTHOFF, *supra* note 191, at 358. The various causes of action may differ considerably in such respects as the statute of limitations, applicability of contributory negligence doctrine and measure of damages. *Id.* at 357-59.

208. Entwurf eines Staatshaftungsgesetzes [hereinafter cited as STHGE [1973]] in KOMMISSIONSBERICHT, *supra* note 203. The bill gives litigants a choice between damages (*Geldersatz*) and specific relief (*Herstellung*). STHGE [1973], *supra*, §§ 2-4.

The bill still requires plaintiffs to show the violation of a legal right. However, one controversial section of the bill would make the measure of damages, which in every case is to be "reasonable and appropriate," vary depending on the seriousness of the injury, the seriousness of fault, if any, and the forseeability of damage. Plaintiffs would be entitled to full expectation damages only in the case of intentional wrongdoing or gross negligence. *Id.* § 2. *See generally* Haueisen, *supra* note 206, at 455-56; Hesse, *supra* note 207, at 15; Papier, *supra* note 205, at 573.

The reform, which would apply only to claims of wrongful or illegal activity, would

cases available only in the administrative courts,[209] would become the exclusive remedy in damages for wrongful governmental action.[210]

Though the commission's bill deletes from article 34 of the Constitution any reference to officer liability, it clearly reaffirms the principles that now govern the possibility of *Rückgriff* against the individual official, in particular its restriction to intentional or grossly negligent wrongdoing.[211] However, neither the reform nor the extensive scholarly criticism it has received shows particular concern for the fact that the *Rückgriff* is seldom used. The same can be said of the government's revised bill of 1976, which makes several important changes in the reform,[212] but leaves its outlines essentially intact. In fact, the draftsmen of the new bill expressly disfavored limiting the government's discretion in deciding whether or not to pursue its right of recovery.[213]

C. *The French and German Systems Compared*

Despite their characteristic separation between governmental and officer liability and between civil and administrative courts, France, and to a lesser extent Germany, have moved toward an integrated system of

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not affect such claims as *Enteignung, see* note 204 *supra,* or *Aufopferung, see* note 205 *supra,* which assume the validity of administrative action. STHGE [1973], *supra* § 15; KOMMISSIONSBERICHT, *supra* note 203, at 49.

209. According to the bill, all claims subsumed under the new cause of action must be brought in the court which normally would have jurisdiction over the legality of the type of administrative action in question. STHGE [1973], note 208 *supra,* § 24. In most cases, this will be the administrative courts.

210. *Id.* § 1(3). This would necessitate an amendment to article 34 of the Constitution. Entwurf eines Gesetzes zur Anderung des Grundgesetzes, *reprinted in* KOMMISSIONSBERICHT, *supra* note 203, at 68. Since the bill would make it impossible to sue the individual official directly, it also provides for repeal of § 839 of the BGB. STHGE [1973], *supra* note 208, § 34(1)(1).

211. STHGE [1973], *supra* note 208, § 28; KOMMISSIONSBERICHT, *supra* note 203, at 139-42. The bill also retains the provision of current law which conditions the government's right of recovery against an official who is guilty only of gross negligence upon its having no other source of indemnity. *Id.* at 141. *See* notes 201-02 *supra.* As a result of the change in jurisdictional principle to be made by the reform, *supra* note 209, the *Rückgriff* action would now be exercised in the administrative courts. KOMMISSIONSBERICHT, *supra* note 203, at 142. Finally, the current reference to the *Rückgriff* in article 34 of the Constitution would be eliminated, since governmental liability under the reform would no longer be premised upon the existence of officer liability. *Id.* at 69.

212. Referentenentwürfe, in REFORM DES STAATSHAFTUNGSRECHTS (Sept. 1976). Among its changes, the revised bill would (1) base the government's liability upon the wrongfulness of its action, rather than its violation of legal rights (§ 1), (2) generally excuse the government from any liability in damages, if the injury caused could not have been avoided even with the utmost of care (§ 2(3)), (3) not make the measure of damages depend on the degree of fault or foreseeability of injury (§ 2), and (4) provide that the same measure of damages be applied in *Enteignung, see* note 204 *supra,* and *Aufopferung, see* note 205 *supra,* actions otherwise not affected by the reform (§ 15(3)). For other differences between the 1973 and 1976 drafts, *see* Haverkate, *Neues und Altes zum Staatshaftungsrechts,* 10 ZEITSCHRIFT FUR RECHTSPOLITIK [Z.R.P.] 33 (1977); Renck, *Zur Reform des Staatshaftungsrechts,* 10 Z.R.P. 221 (1977); Schmidt, *Der Vergessene Beseitigungsanspruch: Zum Referentenentwurf 1976 eines Staatshaftungsgesetzes,* 32 JURISTENZEITUNG 123 (1977).

213. REFORM DES STAATSHAFTUNGSRECHTS 170-71 (Sept. 1976). Section 42 of the new bill would eliminate from applicable law, *see* note 202 *supra,* the provision according to which the government's right of recovery against an official in the case of gross negligence is conditional upon its having no other source of indemnification. *See also* H. VOGEL, *supra* note 190, at 25.

liability for government-inflicted harm. Each in a distinctive manner makes it highly probable, if not certain, that persons injured through governmental action will seek damages from the government rather than the public official. This development recognizes not merely the government's greater financial means, but also the fact that in many situations warranting compensation, the imposition of personal liability upon the individual official would be unjust or counterproductive.

More problematic is the efficacy of the right of recovery reserved to the government under both French and German law. If, as the literature suggests, the government rarely exercises this right, its deterrent and retributive functions may be of only theoretical importance. The explanation for the apparent lack of concern over this phenomenon may lie in the fact that both legal systems actually satisfy the need for deterrence and retribution through administrative discipline.

CONCLUSION

Although virtually every American jurisdiction under some circumstances permits litigants to sue both the government and its officials in tort, the relationship between governmental and officer liability remains to a large extent ill-defined. The failure of legislatures to resolve many of the problems that flow from the coexistence of these two bodies of law has had the effect both of transferring basic policy decisions to the courts and of greatly complicating governmental tort claims litigation. Furthermore, if there is any substance to the notion that the prospect of personal liability instills an unhealthy insecurity in public officials, uncertainty over the relationship between governmental and officer liability probably only aggravates the situation. Finally, confusing the various interests served by governmental and officer tort liability obscures the very great dilemma judges and juries face in attempting to render verdicts that provide tort victims adequate compensation, while simultaneously protecting the individual official from excessive personal liability.

The best solution from nearly every point of view lies in a separation of the various functions—compensatory, deterrent and retributive—served by tort liability in the governmental context. Such a separation can be achieved through both the exclusive governmental liability model and the governmental liability with indemnification model. Under either arrangement, the courts would initially concentrate upon those factors directly relevant to the tort victim's entitlement to compensation. Questions relating to deterrence and retribution, on the other hand, would be entrusted in the first instance to the government. Should action against the official be desirable, the government may, depending upon the model chosen, impose disciplinary measures or pursue its right of recovery in the courts.

The French and German experiences tend to support this type of

reform; but they cast serious doubt on the efficacy of the governmental right of recovery as a deterrent mechanism, at least in the absence of safeguards designed to assure its actual use. Similar safeguards are desirable even in a system relying upon administrative disciplinary sanctions since such sanctions, too, must be credible in order to serve their deterrent purpose.